TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 48.

NATHANIEL R. DOBSON, PLAINTIFF IN ERROR,

vs.

WILLIAM A. HEARNE.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED OCTOBER, 1900.

(20,280.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 48.

NAPOLEON B. DOTSON, PLAINTIFF IN ERROR,

vs.

WILLIAM A. MILLIKEN.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 1642.

NAPOLEON B. DOTSON, Appellant,
vs.
WILLIAM A. MILLIKEN.

a Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN, Plaintiff,
vs.
NAPOLEON B. DOTSON, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration.*

Filed January 19, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN, Plaintiff,
versus
NAPOLEON B. DOTSON, Defendant.

1. The plaintiff sues the defendant for that heretofore, to wit, in the month of April, 1902, the defendant represented to the plaintiff that he, the defendant, owned and controlled one hundred and twenty-four thousand (124,000) acres of coal lands located in Letcher and Harlan Counties, in the State of Kentucky, that he had obtained the consent and agreement of a certain railway company, namely, the Southern Railway Company, to construct a branch railway into the said lands and that he desired to secure a purchaser for either the whole or for any considerable quantity of the said lands, at and for

the price of Twenty ($20.00) Dollars per acre, and that, if the plaintiff would find such purchaser or purchasers, at the said price, he would allow, pay and cause to be paid to the plaintiff the sum of Two dollars and a half ($2.50) for each and every acre so sold, and the defendant did then and there, to wit, at the time aforesaid, agree with the plaintiff to pay and to cause to be paid to the plaintiff, in consideration of the time, labor and moneys by him expended and to be expended in procuring a purchaser therefor, the said sum
2 of Two dollars and a half ($2.50) per acree of the said lands for which the plaintiff would find a purchaser at the said price of Twenty ($20.00) Dollars per acre, and thereupon the plaintiff, in reliance upon the said representations, undertakings and promises of the defendant, diligently applied himself to the task of finding such a purchaser, and through the expenditure of much of the plaintiff's time, to wit, the space of five (5) months, and at his great pecuniary expense, to wit, at an expense of about Two thousand five hundred ($2,500.00) Dollars, and after much effort, anxiety and labor by him exerted, suffered and performed in that behalf, the plaintiff thereafter, to wit, on or about the 15th day of September, A. D. 1902, procured and furnished the defendant a responsible purchaser, namely, the Tri-State Coal and Coke Company, of Pittsburg, Pennsylvania, which was then and there ready, able and willing to purchase ten thousand (10,000) acres of the said lands, at and for the price of Twenty ($20.00) Dollars per acre, in cash, subject only to the truth of the defendant's aforesaid representations in respect to the said lands, whereupon it transpired that the defendant's said representation that he had obtained either any consent or any agreement of the said railway company to construct a branch railway, or any railway, into the said lands, but for which representation the plaintiff would not have entered into the said contract with the defendant, and would not have employed his time, effort and money in any attempt to make sale of said lands, was untrue, for which reason only, and without any fault or default upon the part of the plaintiff in the performance of his duty or undertaking in the premises, the said purchaser declined to proceed further in
3 the matter, and the defendant then and there, by reason of the premises, became indebted to the plaintiff in the sum of Twenty-five thousand ($25,000.00) Dollars, for which said sum, with interest thereon from the 15th day of September, 1902, he brings suit.

2. And the plaintiff further sues the defendant for that heretofore, to wit, in the month of April, 1902, the defendant represented to the plaintiff that he, the defendant, owned and controlled one hundred and twenty-four thousand (124,000) acres of coal lands located in Letcher and Harlan Counties, in the State of Kentucky, that he had obtained the consent and agreement of the Southern Railway Company to construct a branch railway into the said lands and that he desired to secure a purchaser for either the whole or for any considerable quantity of the said lands, at and for the price of Twenty ($20.00) Dollars per acre, and that, if the plaintiff would find such a purchaser or purchasers, at the said price, he would allow

pay and cause to be paid to the plaintiff the sum of Two dollars and a half ($2.50) for each and every acre so sold, and the defendant did then and there, to wit, at the time aforesaid, agree with the plaintiff to pay and cause to be paid to the plaintiff, in consideration of the time, labor and moneys by him expended and to be expended in procuring a purchaser therefor, the said sum of Two dollars and a half ($2.50) per acre for every acre of the said lands for which the plaintiff would find a purchaser at the same price of Twenty ($20.00) Dollars per acre, and thereupon the plaintiff, in reliance upon the said representations, undertakings and promises of the de-
4 fendant diligently applied himself to the task of finding such a purchaser, and, through the expenditure of much of the plaintiff's time, to wit, the space of five (5) months, and at his great pecuniary expense, to wit, at an expense of about Two thousand, five hundred ($2,500.00) Dollars, and after much effort, anxiety and labor by him exerted, suffered and performed in that behalf, the plaintiff thereafter, to wit, on or about the 15th day of September, 1902, procured and furnished the defendant a responsible purchaser, namely, the Tri-State Coal and Coke Company, of Pittsburg, Pennsylvania, which was then and there ready, able and willing to purchase ten thousand (10,000) acres of the said lands, at and for the price of Twenty ($20.00) Dollars per acre, in cash, subject only to the truth of the defendant's aforesaid representations in respect to the said lands, and the defendant then and there, by reason of the premises, became indebted to the plaintiff in the sum of Twenty five thousand ($25,000.00) Dollars, for which said sum, with interest from the 15th day of September, 1902, he brings suit.

3. And the plaintiff further sues the defendant for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money lent by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on accounts stated between them. And the plaintiff claims Twenty-five
5 thousand ($25,000.00) Dollars, with interest from the 15th day of September, A. D. 1902, besides the costs of this suit.

J. J. DARLINGTON,
Attorney for Plaintiff.

8.

Notice to Plead.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

J. J. DARLINGTON,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA, *ss:*

I, William A. Milliken, on oath say that I am the plaintiff named in the foregoing and annexed declaration, wherein one Napoleon B.

Dotson is named as defendant, and that my cause of action against the said defendant is as follows:

In the month of April, 1902, the said Napoleon B. Dotson stated to me that he owned and controlled one hundred and twenty-four thousand (124,000) acres of coal lands, located in Letcher and Harlan Counties, Kentucky, and that he had obtained from the Southern Railway Company its consent and agreement to construct a branch railway into the said coal lands in Letcher and Harlan Counties aforesaid. He also represented to me that he was desirous of
6 securing a purchaser for either the whole or for any considerable quantity of the said lands, at and for the price of Twenty ($20.00) Dollars per acre, and he promised me, if I would procure a purchaser or purchasers therefor, that he would pay me the sum of Two and one-half dollars ($2.50) for each and every acre for which I should find a purchaser at and for the price of Twenty ($20.00) Dollars per acre as aforesaid. In accordance with this promise, and after an expenditure of about five (5) months in time, and at an expense of about Twenty-five hundred ($2,500.00) Dollars, upon my part, and after much effort and labor, on or about the 15th day of September, A. D. 1902, I procured and furnished the defendant a responsibe purchaser, namely, the Tri-State Coal and Coke Company, of Pittsburg, Pennsylvania, which was then and there ready, able and willing, and which then and there offered, to purchase ten thousand (10,000) acres of the said lands of the defendant, at and for the price of Twenty ($20.00) Dollars per acre, in cash.

I further on oath say that I entered into the said contract with the said defendant and employed my time, effort and money in endeavoring to make sale of the said lands upon the faith of the representation by the said defendant that he had obtained the consent and agreement of the said railway company to construct a branch railway into the said lands, but for which representation I would not have undertaken the said enterprise, and subject to the truthfulness of which representation the said offer to purchase the ten thousand (10,000) acres aforesaid was made; but that it afterwards was found that the said representation was untrue and that the said railway company had neither agreed nor consented, then or at any
7 future time, to construct its lines or any line, into or any where near the said lands, for which reason only, and without any fault, default or failure on my part in the performance of my undertaking with the defendant in the premises, the said purchaser declined to consummate the transaction; and that, by reason of the premises, I have just right to recover from the defendant what I claim in my said declaration, namely, the sum of Twenty-five thousand ($25,000.00) Dollars, with interest from the 15th day of September, A. D. 1902, exclusive of all set offs and just grounds of defense.

WILLIAM A. MILLIKEN.

Sworn to and subscribed before me this 19th day of January, A. D. 1903.

WM. CLEARY SULLIVAN,
[NOTARIAL SEAL.] *Notary Public, District of Columbia.*

Defendant's Pleas.

Filed February 4, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN
vs.
NAPOLEON B. DOTSON.

The defendant for pleas to the plaintiff's declaration, says:

1st. That he never promised as alleged.

8 2nd. That he never represented to the plaintiff that he had obtained the consent and agreement of the Southern Railway Company to construct a branch railway into the lands mentioned in the declaration, as therein alleged.

3rd. That the plaintiff never procured and furnished the defendant a responsible purchaser, to wit: The Tri-State Coal and Coke Company of Pittsburg, Pennsylvania, or any other corporation or person, which or who was or were ready, able or willing to purchase 10,000 acres of said lands, or any other quantity whatever, at the price of twenty dollars per acre in cash, or for any other sum whatever, subject only to the truth of defendant's alleged representation that the Southern Railway Company would construct a branch railway into the said lands.

4th. That the said plaintiff never devoted any time or expended any money in an effort to make sale of any said lands in the declaration mentioned at the request of the defendant.

5th. For further plea in this behalf, the said defendant says that he agreed with the said plaintiff that if he would find a purchaser for 10,000 acres of the lands in the declaration mentioned, or any other larger quantity thereof, at the price of twenty dollars per acre, that upon the payment of the purchase money therefor by the purchaser he, the said plaintiff, should have the sum of two dollars and fifty cents per acre for each and every acre for which he might find a purchaser as aforesaid out of the said purchase money so to be paid by the purchaser. And the said defendant further says

9 that the said plaintiff did not obtain or furnish any purchaser who was willing or able, or who ever offered to take or pay for, or who ever did take and pay for any of said lands whatever, and the said defendant is not indebted to the plaintiff in any sum on account of any such supposed sale or any supposed efforts or expenditure of money on his part to find a purchaser for said lands.

GEO. C. HAZELTON,
C. C. COLE,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *to wit:*

I, Napoleon B. Dotson, on oath say that I am the defendant named in the foregoing pleas to the declaration filed in this cause against me by one William A. Milliken. I deny that I am indebted to the said plaintiff in any sum whatever on account of the matters set forth in his said declaration or the affidavit thereto attached, or on any other account whatever. It is true, as stated in the affidavit attached to the said declaration, that this defendant in or about the month of April, 1902, represented to the said plaintiff that he, the said defendant, controlled about 124,000 acres of coal lands located in Letcher and Harlan Counties, Kentucky, but he positively denies that he then or at any other time represented to the said plaintiff or to any other person that he had obtained from the Southern Railway Company its consent and agreement to construct a branch railway into the coal lands aforesaid. It is true that he represented to the plaintiff that he was desirous of securing a purchaser
10 for either the whole or any considerable quantity of said lands at the price of twenty dollars per acre, and that he offered the said plaintiff to pay him the sum of two dollars and fifty cents for each and every acre for which he should find a purchaser at and for the price of twenty dollars per acre, but he says it is also true that it was then expressly understood between him and the said plaintiff that he, the said plaintiff, should not be entitled to receive any compensation whatever until after he had procured such purchaser and such purchaser had actually purchased and paid for the said lands, and the compensation so offered to be paid said plaintiff was to be paid him out of the purchase money for such lands to be paid by the purchasers who should be procured by the said plaintiff. Defendant says that he believes it is true that plaintiff expended some time in trying to obtain a purchaser or purchasers for some or all of said property, but upon information and belief he denies that he devoted anything like five months to said efforts, and upon like information and belief he denies that he expended the sum of two thousand five hundred dollars, or any other considerable sum of money, in and about his said efforts. And defendant denies that he was to be liable to the said plaintiff for any money whatever that might be so expended by him in his efforts to find purchasers. Defendant positively denies the allegation in said affidavit of plaintiff attached to said declaration that he procured and furnished a responsible purchaser, namely, the Tri-State Coal and Coke Company of Pittsburg, Pennsylvania, which was then ready, able and willing, and which then and there offered to purchase 10,000 acres of the said lands of the defendant at and for the price of twenty
11 dollars per acre in cash, or that said alleged purchaser offered or expressed itself as willing to purchase any other quantity of said lands at any price whatever, or upon any terms whatever at any time. Defendant further denies that the said plaintiff entered into the contract or arrangement with the defendant mentioned in the plaintiff's declaration and affidavit attached thereto upon the faith of the alleged representation by said defendant that he had ob-

tained the consent and agreement of the said railway company to construct a branch railway into the said lands. The defendant positively denies that he ever made any such representation to the said plaintiff or any one else. It is true that the said defendant and others conferred with the authorities of the said railway company looking to an arrangement by which said company would construct a branch road into said lands, and said company intimated upon what terms it would probably be willing to undertake said work. The said plaintiff and the officers of the said Tri-State Coal and Coke Company knew of the state of the conferences with the officers of the said railway company, and the terms upon which they were probably willing to undertake the construction of such branch road. It was understood between the plaintiff and defendant that any proposed purchaser which he might secure for the said lands, or any part thereof, should join the defendant in an effort to induce the said railway company to construct said branch road, and the fact that a purchaser or purchasers should be found for the whole or some large quantity of said lands, willing to immediately develop the coal therein, was to be the inducement to the said railway company to undertake said work. And the plaintiff and the officers of
12 the said Tri-State Coal and Coke Company were aware all the time of the conditions upon which said railway company was willing to undertake said work. And the said Tri-State Coal and Coke Company finally declined to purchase any of said land, but did not base its declination upon the alleged grounds either that the railway company had declined to construct said branch road, or that defendant had represented that they would construct it.

N. B. DOTSON.

Subscribed and sworn to before me this 31st day of January, 1903.

WALTER F. DONALDSON,
Notary Public, D. C.

[NOTARIAL SEAL.]

Joinder of Issue.

Filed February 6, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN
vs.
NAPOLEON B. DOTSON.

The plaintiff joins issue with the defendant upon his first plea.

J. J. DARLINGTON,
Attorney for Plaintiff.

S.

13 *Demurrer.*

Filed February 6, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN
vs.
NAPOLEON B. DOTSON.

The plaintiff says that the defendant's second, third, fourth and fifth pleas are bad in substance.

J. J. DARLINGTON,
Attorney for Plaintiff.

Per S.

NOTE.—One of the points of law to be argued on the hearing of the demurrer to the defendant's said pleas is that they are the mere equivalents of the first plea.

J. J. DARLINGTON,
Attorney for Plaintiff.

S.

Notice.

Please take notice that the foregoing demurrer will be presented to Circuit Court No. 2, Mr. Justice Clabaugh presiding, on Friday, the 13th day of February, A. D. 1903, at 10 o'clock A. M., or so soon thereafter as counsel can be heard, for its action.

J. J. DARLINGTON,
Attorney for Plaintiff.

S.

Service accepted this 6th day of Feb. 1903.

C. C. COLE,
Att'y for Def.

14 *Order Sustaining Demurrer.*

Supreme Court of the District of Columbia.

THURSDAY, *March 5th*, 1903.

Session resumed pursuant to adjournment Hon. H. M. Clabaugh, Justice, presiding.

* * * * * * *

No. 45930. At Law.

WILLIAM A. MILLIKEN, Plaintiff,
v.
NAPOLEON B. DOTSON, Defendant.

Upon consideration of the demurrer to defendant's second, third, fourth and fifth pleas filed herein, it is ordered that said demurrer be and it is hereby sustained.

Order to Enter Case to the Use of Harry B. Mason.

Filed April 30, 1903.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN
versus
NAPOLEON B. DOTSON.

The clerk will please enter the above entitled cause, and any judgment which may be recovered therein, to the use of Harry B.
15 Mason.

WILLIAM A. MILLIKEN, *Plaintiff.*
Attorney for Plaintiff,
J. J. DARDINGTON,
S.

Memorandum.

October 25, 1905.—Verdict for plaintiff for Twenty-five thousand dollars ($25,000.00).

Motion for a New Trial, Judgment, and Appeal.

Supreme Court of the District of Columbia.

FRIDAY, *November 10th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

No. 45930. At Law.

WILLIAM A. MILLIKEN, Plaintiff,
vs.
NAPOLEON B. DOTSON, Defendant.

Upon consideration of defendant's motion for a new trial, filed herein by his attorneys, it is ordered that said motion be and is

hereby overruled and judgment on verdict is hereby ordered. Thereupon, it is considered and adjudged that the plaintiff herein recover
of the defendant herein the sum of Twenty-Five Thousand
16 dollars ($25000.00) being the money heretofore found
payable by the defendant herein to said plaintiff by reason of the premises, with interest thereon from this date, together with his costs of suit to be taxed by the clerk and have execution thereof. From the aforegoing judgment the defendant by his attorneys in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and prays that bond be fixed.

Whereupon it is ordered that defendant furnish bond on such appeal herein with surety or sureties to be approved by this court in the penalty of Thirty Thousand Dollars, to operate as a Supersedeas, or if for costs in the penalty of One Hundred Dollars.

17 Filed Nov- 21, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN, to the Use of HARRY B. MASON,
vs.
NAPOLEON B. DOTSON.

The President of the United States to William A. Milliken, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the Rules of said Court, pursuant to an appeal noted in the Supreme Court of the District of Columbia, on the 10th day of November, 1905, wherein Napoleon B. Dotson is Appellant, and you are Appellee, to show cause, if any there be, why the Judgment rendered against the said Appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, Chief Justice of the Supreme Court of the District of Columbia, this 21st day of November in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Service of the above Citation accepted this 21st day of November, 1905.

J. J. DARLINGTON,
Attorney for Appellee.

[Endorsed:] No. 45930. Law. Equity. William A. Milliken *vs.* Napoleon B. Dotson. Citation. Filed Nov. 21, 1905. J. R. Young Clerk. Geo. C. Hazelton Attorney for Appellant.

18 *Memoranda.*

November 23, 1905.—Appeal Bond, filed.
December 15, 1905.—Time to submit Bill of Exceptions extended to December 23, 1905.

Bill of Exceptions Made a Part of Record.

Supreme Court of the District of Columbia.

SATURDAY, *December 30th,* 1905.

Session resumed, Hon. Harry M. Clabaugh, Chief Justice, presiding.

No. 45930. At Law.

WILLIAM A. MILLIKEN, Pl'ff,
vs.
NAPOLEON B. DOTSON, Def't.

Upon motion that the Bill of Exceptions herein, taken at the trial of this cause be signed and made of record now for then, it is accordingly done and so ordered.

19 *Bill of Exceptions.*

Filed December 30th, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN, Plaintiff,
v.
NAPOLEON B. DOTSON, Defendant.

The above-entitled cause came on for trial at this, the October term of the Court, 1905, before Mr. Chief Justice Clabaugh and a jury. And thereupon, to maintain the issues on his part joined, the plaintiff gave evidence tending to prove the issue on his part joined as follows:

FRANKLIN WATERMAN, called as a witness for the plaintiff, testified that he knew plaintiff and defendant; that he was present at a meeting of said gentlemen at his office, 1333 F Street, Washington, D. C., in the spring of 1902, as he remembers in April, and heard what took place between them in a general way; he introduced the parties and Dotson presented his prospectus of the coal lands to Milliken and there was more or less conversation regarding the quality of the land, the accessibility, &c., and the prospectus, as he re-

members, was left with Milliken; after more or less talk the parties separated; heard Milliken remark that he was familiar with the country and had been over it; Milliken at once asked the question as to its accessibility to market, how coal could be gotten to market, the nearest railroad, and Dotson gave him the assurance that
20 a railroad had been promised—that a railroad was going in there—into that country. Has had correspondence with Dotson; knows his handwriting; identifies letter of May 8, 1902, as in the handwriting of Dotson; letter offered in evidence by plaintiff and read to the jury, as follows:

"MAY 8TH, 1902.

"Mr. W. A. Milliken, c/o Hotel Henry, Pittsburg, Pennsylvania.

"DEAR SIR: I have your telegram here to-day. I have already discussed fully with Mr. Spencer the point with reference to extent of development he would like to have on the property to commence with, and am glad to say that Mr. Spencer is willing to build the road into the property without placing any requirements on the property holders to put in certain sized plants, or any number of coke ovens. I have explained fully to Mr. Spencer our plans for the development of the land, and now ready to commence work on the road just as soon as we are ready for him to do so, and we can use our own judgment to the extent of development we would put on the lands to begin with. Mr. Spencer has investigated the situation and knows the Southern and Louisville and Nashville Railroad can furnish a market for a vast amount of coal and coke from this field. This I presume you will understand without going into details. They know when the property is opened up and the market furnished for the coal and coke that the owners of the property will arrange to furnish the coal and coke, the connection with the Louisville and Nashville and Southern we believe is all that could be desired as they will furnish a ready market for a large amount of coal and coke, all that operators mining the coal and making the coke could desire for years. If however, it should be desired to have other R. R. connections with the property this could be done later, but I think it hardly probable that we would ever want any other railroads built into the property as the Southern and L. & N. would furnish ample market for the coal and coke if developed on a large scale, even if commenced in a small way.

"I leave for Wise, Virginia, to-day.

"Yours truly, N. B. DOTSON."

Never met parties together but once; all that was done at the meeting was talking in general of the lands, quality, &c., accessibility to market, and the presenting of the prospectus; the prospectus
21 was handed to Milliken in the presence of witness and it was talked over in a general way, and looked at and examined by Milliken; witness glanced over the prospectus in a general way, but does not recall that he read over the portion relating to representations as to railroads.

SAMUEL SPENCER, president of the Southern Railroad, called as a witness for the plaintiff, testified that there was never any agreement or promise to construct a branch railway into the Harlan County coal lands; that he had expressed a willingness to take up the matter with the defendant and others, provided there were assurances of a sufficient amount of business to warrant its construction, in the opinion of the Company, but that these assurances were never forthcoming, and that the Company had never reached a consideration of the matter of its construction; that there was never any agreement or treaty for the construction of the branch road without any requirement on the part of the owners to put in any certain size of plant or number of coke ovens, or to build it whenever the defendant and his associates were ready to have the railroad company do so, leaving them free to use their own judgment as to the extent of the development they would put on the land to begin with; that, during the summer of 1902, engineers of the railroad company were engaged in locating a line of road in this section, as preparatory only to a possible construction, and that the company acquired rights of way over some portions of such a road, partly by donation, partly by purchase, and partly by conditional contracts, based upon construction; that, if the defendant and others had bound themselves in a manner
22 satisfactory to the Railway Company to make certain sufficient developments, it would have built the road, and that the witness had had no communication nor correspondence with the plaintiff in regard to the matter until January 1903; that the terminal of the line that was located in the summer of 1902 was substantially at Middlesboro and Harlan Court House, Kentucky; in a general way those were the termini of the proposed line; that the length of the proposed line was about 40 miles; that a thorough survey of the entire territory was made; that the surveys were begun about the 1st of May, 1902, and finished about September 1, 1902; that the rights of way for the line between Middleboro and Harlan Court House were contracted for at various times between May, 1902, and November, 1902; that no work of construction was done—certainly none substantial; there might have been a spadeful of dirt thrown up; that he had interviews with Dotson and others upon the question of developments in that territory looking to an arrangement for building a railroad; that he was favorably inclined to construct the road if satisfactory developments would be made to justify it; that he might have built the road if Dodson or others had bound themselves or given satisfaction of certain developments that would have justified the undertaking; that was the inclination until November, 1902, when the monetary condition was not favorable to railroad construction; that up to that time the construction of the road would have been considered favorably; that he had conversations or correspondence either with Milliken in relation to building the road during the spring and summer of 1902; that he does not think he had any negotiations with Milliken in relation to
23 building the road during that time, but witness' memory is not distinct on that; that he may have had conversations with him in a general sort of way; that witness' impression is that his conversations occurred with Milliken sometime after his first seeing

Dotson and others, that is after Dotson first brought the question to their attention; thinks the conversations were sometime after the surveys were made; cannot fix the time; thinks the correspondence with Milliken was after the falling out between him and Dotson; had correspondence with the Tri-State Coal and Coke Co.; produces a letter of Aug. 23, 1902, which he never answered, but it was answered by Mr. Finley, the Second Vice President. The letter is offered in evidence by the defendant, and reads as follows:

"Tri-State Coal & Coke Company.

PITTSBURG, PA., *Aug.* 23, 1902.

"Mr. Samuel Spencer, Pres. Southern Railway, 80 Broadway, New York, N. Y.

"DEAR SIR: We have the matter of purchase of coal land in Harlan County, Ky. up at this time with Mr. Dotson of Wise, Va., who claims that the Southern Railway will build up the Cumberland River from Middlesboro extending up Poor Fork of this River without delay. It would be our purpose, if the railway was completed in the near future, to mine and ship coal, also make coke at once. It would not be our purpose to invest in coal land for development at some indefinite future time.

"The most available points we have been able to locate in the territory referred to are in the vicinity of Hurricane Gap, as indicated on the Government Geological map, a distance of probably forty-five miles from Middlesboro.

"If you can give us a definite idea as to when we can expect a railroad at the point mentioned we could then decide as to whether or not we would purchase the land which is now offered to us.

"Awaiting your prompt reply, we are,

"Very truly yours,

"TRI-STATE COAL & COKE CO.,
"By T. J. EASTER.

"P. S.—Mr. W. A. Milliken referred us to you as to above."

The witness says the foregoing letter was the basis of a
24 little further correspondence between the President of the Tri-State Coal & Coke Co. and Mr. Finley, the Second Vice President of the Southern Railway Co., and produces a letter from W. W. Finley, to T. J. Easter, President Tri-State Coal & Coke Co., which was introduced in evidence by the defendant, and is as follows:

"Southern Railway Company.

"AUGUST 29, 1902.

"Mr. T. J. Easter, President Tri-State Coal & Coke Co., Pittsburg, Pa.

"MY DEAR SIR: Your letter of the 23rd instant, addressed to President Spencer, has been referred to me for reply:

"The construction of a line in the territory mentioned by you is

now under investigation and consideration but no final conclusions have been reached. Conclusions in the matter would be greatly facilitated if we could be advised from time to time of actual developments which parties in control of the lands contiguous to such a line would obligate themselves to undertake.

"I shall be pleased to hear from you further on this subject.

"Very truly yours,

"W. W. FINLEY,
"Second Vice-President."

A letter was produced by the witness from T. J. Easter, President Tri-State Coal & Coke Co. to W. W. Finley, 2nd Vice President, Southern Railway Co., which was introduced in evidence by the defendant, and is as follows:

"Tri-State Coal & Coke Company.

PITTSBURG, PA., *Sept. 17th*, 1902.

"Mr. W. W. Finley, 2nd Vice-Pres't Southern Railway Company, Washington, D. C.

"DEAR SIR: Replying to yours of the 29th, will say that our letter of Aug. 23rd fully explains our position, and if you will refer to same you will understand what we would like to know.

"Yours truly,

"TRI-STATE COAL & COKE CO.,
"By T. J. EASTER."

Witness is not aware of any other correspondence between himself or any other officer of his Company and the Tri-State
25 Coal & Coke Co.; he does not recall any correspondence between himself or any other officer of his Company and Judge Potter, attorney of The Tri-State Coal & Coke Co.; does not remember having any interview with Judge Potter, but does not know that he did not; had correspondence with Milliken, the earliest letter bearing date Jan. 6, 1903; witness knows Mr. C. P. Perrin, but does not recall that he handed him a letter in 1902 from Milliken; has no such letter of record; has no letter from Milliken, as far as he knows, prior to Jan. 6, 1903; has had several conversations with Perrin in the past five or six years about building the road.

THOMAS J. EASTER, called as a witness on behalf of the plaintiff, testified that he was the president of the Tri-State Coal & Coke Co., that the plaintiff undertook the negotiation of a sale to witness of certain coal lands in Harlan County, Kentucky, in the spring of 1902; that his Company was not willing to invest in anything except property which could be developed almost immediately, and that the plaintiff produced the letter of May 8th from the defendant, stating that he had completed arrangements with Mr. Spencer, of the Southern Railroad Company, to construct a railroad into said lands, without any particular assurances as to the improvements which would be necessary; that thereupon Mr. Wilson of the Tri-State

Coal & Coke Co., with a Mr. Koontz, made another trip over the property, but not until an option in writing had been asked for and delivered to Mr. Wilson before starting; that, after the return of Messrs. Wilson and Koontz, we expressed a desire to talk over with Dotson in regard to the railroad being built, and at an interview with the defendant in Pittsburg in September we informed him that we
26 would take the 10,000 at $20.00 per acre, if he could show some tangible arrangement between himself and the railroad company to build the line; and asked him what assurance he could give in regard to its being built, to which he replied that he had Mr. Spencer's promise to build the road regardless whether operations were begun at once or not, that he had nothing in writing, but that he considered Mr. Spencer's word as good as a written contract; that he had sold 30,000 acres to the International Harvester Company, and knew that the railroad company would accommodate any operations started by that company; we could not get sufficient assurance from Mr. Dotson at this meeting to make any headway toward purchasing the land, but he promised to effect a meeting between ourselves and the railroad people at which meeting he was sure a written agreement could be had; that we have not heard from the defendant or the railway company since in reference to their willingness to proceed with the railroad; we did not buy the land for the reason that there was no prospect of a railroad or any arrangement existing for a railroad to be built to the tract; we failed to close at the meeting at Hotel Henry because Dotson could not assure us that any railroad would be built and has not been able to do so since, and we therefore gave up the entire proposition, and purchased coal lands elsewhere; that we would not think of buying land in that section without a railroad, and had refused to take up the matter seriously with the defendant until after being shown the defendant's letter of May 8th, 1902. This witness produced a letter from the defendant to himself, under date of Jan. 24, 1903, in the words and figures following:

"JANUARY 24, 1903.

27 "Mr. T. J. Easter, Pittsburg, Pa.

"DEAR SIR: W. A. Milliken of this city is making claim against us for commission on the sale of ten thousand acres of coal lands in Harlan Co. Kentucky that he alleges to have sold you for me. I am not aware of any such sale having been made but if Milliken has sold you ten thousand acres for us, while he was not authorized to do so, but claims that the price at which he sold you the land was $20.00 per acre. Will you please let me know on receipt of this as to the truth of his statement. If he has made sale to you of the ten thousand acres at $20.00 per acre and you are ready to settle for the lands we are willing to pay him his commission but if he has not made sale to you or your company then he would not be entitled to any commission from us.

"I hope you will favor me with an early reply. If you bought the lands at $20.00 per acre we are perfectly willing that you should have them and are ready to make you conveyance of the property upon payment of the price of $20.00 per acre.

"Yours truly, N. B. DOTSON."

Witness produced a letter from Tri-State Coal & Coke Co., by T. J. Easter, to N. B. Dotson in the words and figures following:

"PITTSBURG, PA., *Jan.* 30, 1903.

"Mr. N. B. Dotson, 916 15th St., Washington, D. C.

"DEAR SIR: In reply to yours of the 21st will say that Mr. Milliken did offer us 124,000 acres of coal lands in Harlan and Fletcher Counties, Ky. for sale at $20.00 per acre, stating that it belonged to you and producing a letter from you dated May 8th, 1902, written from the Waldorf-Astoria Hotel, New York, N. Y. stating that you had arrangements with Mr. Spencer President of the Southern R. R. for the building by his company of a railroad line to this land.

"With this understanding and at great inconvenience and expense I went to Ky. and took with me a coal mine manager to examine this land and spent some time in riding over the mountains and examining the coal veins.

"This examination not being satisfactory I subsequently took an option from you on 10,000 acres of this land and again at heavy expense sent two mining engineers to examine this land, upon their return and report we decided to purchase 10,000 acres under our option and so notified Mr. Milliken and for him to notify you.

"You then came to Pgh. and we met you at the room of
28 Mr. Milliken at the Hotel Henry, Pittsburg, Pa. and were ready to close the contract for such purchase and called on you for your contract with Mr. Spencer for the building of the road.

"To our surprise you admitted that you had no contract in writing with him but stated that you had a verbal agreement with him to build a road.

"I then told you to get us a letter from Mr. Spencer to this effect, which you undertook to do. We waited a reasonable time on you and we ourselves wrote Mr. Spencer on the subject and received no reply.

"We then learned from Mr. Milliken that Mr. Spencer denied having made any such agreement with you or anyone to build a railroad in these lands.

"As we would not think of buying land in that section without a railroad would be built there immediately, we dropped the entire matter, and so notified Mr. Milliken. As we would not have gone to the trouble and expense of examining this land but for the positive assurance of your letter of May 8, 1902, that you had an agreement with Mr. Spencer to build the Southern R. R. into the land at once, we have called upon Mr. Milliken to refund us the expense incurred in making this examination.

"Since dropping this matter we have made other arrangements for coal lands and are now developing same and do not care to purchase any more.

Yours very truly,

"TRI-STATE COAL & COKE CO.,
By T. J. EASTER."

Witness first met Milliken in reference to the land in the month of March, 1902, through Mr. Lineaweaver of Stone & Stone, at the Henry Hotel, Pittsburg, Pa.; did not consider the proposition until after the receipt of the letter of May 8 from Dotson to Milliken; witness had the letter of May 8 in his possession from the date it reached Pittsburg until after the negotiations were off and then sent original letter to Milliken; went first to examine the coal lands in the latter part of June; went on that trip himself; it was after June 9; witness understood from information received from plaintiff prior to May 8, that the railroad company required certain assurances of the development of the land before it would undertake to build a branch road; that witness did not decide to consider its proposition all except of the letter of May 8th; does not remember arrangement stated in prospectus; we did not make any further inquiry
29 as to probability of railroad being built after the 8th May, 1902; does not remember requesting Milliken to make further inquiry of railroad officials after May 8, 1902, as to development required as an inducement to build the railroad; witness does not remember having asked Milliken early in June, 1902, or prior to the 9th day of that month to obtain an option on the land on condition that 100 coke ovens be put in and the coal worked for 30 days on trial; if Milliken wrote any such proposition to Dotson it was without the authority or knowledge of witness; that he did not to his knowledge on or before June, 1902, request Milliken to ascertain from Dotson if he could go with Dotson to see Spencer, the president of the Southern Railway, for the purpose of talking about the terms upon which he would build a branch railroad into the Kentucky lands; that he may have suggested something of the kind to Dotson, or some one else, prior to May 8; that he recalls some conversation in July in regard to meeting the railroad people for the purpose of securing a written agreement that the railroad would be put in; that we did not send Judge Potter to New York in July, 1902, to see Spencer, but asked him to stop on his return from New England to see Spencer or some one and ascertain the facts existing in regard to the railroad into Harlan Co.; that we were interested in the conditions, as late as Oct., 1902, upon which the railroad would be built; and it was our purpose to get a written agreement from the proper source upon which to base our conclusions; that he was not aware of the nature of any agreement existing between the officials of the Southern Railway and Dotson about building the road; that he never had any interviews with Dotson, excepting the one at the Henry House; that Dotson showed us no correspondence
30 between Spencer and himself at that interview; that Milliken offered the land at $20 in fee simple, $15 per acre coal right, and not for less.

The witness then identified his own signature to a letter to Dotson of Oct. 23, 1902, which was put in evidence, except the ink memorandum, by the defendant, and reads as follows:

"PITTSBURG, PA., *Oct.* 23, 1902.

"Mr. N. B. Dotson, Washington, D. C.

"DEAR SIR: Replying to yours of the 21st, in regard to agreeing to purchase coal of you, providing the Southern Railway Co. will guarantee a railroad, will say that we are offered Harlan Co. Coal, with all the advantages you claim for yours, at about half the price you ask. We do not mind paying something for the assurance of a railroad, but there is too much difference between your proposition and that of others in the same field.

"If you will mark on the map the coal you will sell regardless of the surface, excepting for operating purposes, and give us the very best price upon condition that a signed agreement can be secured from Mr. Spencer, if operations are commenced at once, we will then say whether or not we care to negotiate for the same.

"I am informed by good authority that the Harvester people do not expect to develop their Ky. coal land in the near future, it being absolutely indefinite as to when they will open up the coal.

"Yours very truly,

"TRI-STATE COAL & COKE CO.,
"By T. J. EASTER."

On the above letter is written by N. B. Dotson the following:

"Big Black Mt. and Mt. Between Yocum creek and Clover fork at $20-fee Coal right $15.

"Between Yocum creek and Clover fork and road from Hagan to Harlan in fee $17. coal right $12.50. Territory northeast of Harlan and Harlan road $12.50 fee; coal right $9.50."

The witness then produced a letter from Dotson in reply to the above, dated Oct. 21, 1902, which was put in evidence by the defendant, and reads as follows:

31 "Washington, D. C., 916 15th St. 1903.

"OCT. 21, 1902.

"Mr. T. J. Easter, President, Tri State Coal & Coke Co., Pittsburg, Pa.

"DEAR SIR: I have your valued favor of the 20th inst. From the conversation I had with Mr. Finley a few days ago, I infer there will be no trouble about Mr. Spencer signing a written agreement to build a railroad into the Harlan Co. field, as he verbally agreed to do some time ago, and the Chicago people were well enough satisfied after talking to Mr. Finley and Mr. Culp, that they did not wait for Mr. Spencer to return to sign the contract for them, but have taken the lands they were considering and paid for them and are now buying some adjoining tracts.

"We would not ask you to meet us in New York until we first made an appointment with Mr. Spencer to see you, and before I make such an appointment would have to know whether or not you want to see him with a view of having him give you an agreement to build the railroad, with the understanding that you would pur-

chase and develop 10,000 acres of coal lands. If you wish to see Mr. Spencer I will arrange a conference with him at the earliest date possible.

"Will be glad to hear from you again soon.

"Yours truly, N. B. DOTSON."

That the witness had nothing to do with propositions to the Sea Board Air Line or Louisville & Nashville Railroads; that the original proposition was 120,000 acres, or a similar number of acres, but we never committed ourselves to the amount we would want until sometime in August, or at the meeting at the Henry House; that he had no written agreement that he remembers except the option; the option is offered in evidence by defendant, and reads as follows:

"Virginia Coke and Steam Coal Co. hereby grants to T. J. Easter, of Pittsburg, Pa. an option to purchase ten thousand acres of land in Harlan County, Ky. at the price of twenty dollars per acre, at any time within sixty days from this date, in consideration of and on condition that the said T. J. Easter shall forthwith send an engineer to examine and report on said lands. Said examination to be completed and report made and said Virginia Coke and Steam Coal Company notified within thirty days from this date, and upon receipt of said report, said T. J. Easter shall elect as to whether or
32 not he will accept this option and purchase said property, and if on receipt of said report, the said T. J. Easter notifies said Va. Coke and Steam Coal Company of his decision to purchase the said lands, within said thirty days, then the said purchase is to be completed, the money paid and deed in fee to said land executed within sixty days from this date.

"Witness the following signature on this 24th day of July, 1902.

"VIRGINIA COKE AND STEAM COAL COMPANY,

"By N. B. DOTSON, *President.*"

The witness produces a letter from the defendant to himself of date Oct. 23, 1902, offered in evidence by defendant, and reads as follows:

"WASHINGTON, D. C., *Oct.* 24, 1902.

"Mr. T. J. Easter, Pres. Tri State Coal & Coke Co., Pittsburg, Pa.

"DEAR SIR: Your favor of the 23rd inst. is received. I will secure a map and mark location and price of lands or coal in different localities in Harlan County. We have over 15,000 acres on Martin's Fork, Grays Knob, Wallace Creek etc. that we could sell you for about one half the price of the Black Mountain lands we offered you. If you would consider the purchase of lands in that section, we would be very glad to sell you lands there but you must not expect to find them as good as the Black Mountain coal.

"I will get map tomorrow, however, and mark location and price at which we can sell you lands or coal and you can then let us know whether or not you care to buy it.

"Yours truly, N. B. DOTSON."

That prior to writing the defendant on January 30, 1903, he learned from a letter from the plaintiff that he intended to sue the defendant.

That at the interview witness had with Dotson he stated that there was no question about the road being built, that men were working on the road while we were there; that the men had been taken off at the present time by an arrangement between himself and Spencer to enable Dotson to secure further options; that he wrote a letter to Spencer Aug. 23, 1902, and thinks the interview with Dotson
33 was after the letter was written; the letter was answered by W. W. Finley. The answer of Mr. Finley is offered in evidence by plaintiff and reads as follows:

"WASHINGTON, D. C., *August* 29, 1902. W. S.
"Mr. T. J. Easter, Tri-State Coal & Coke Co., Pittsburg, Pa.

"MY DEAR SIR: Your letter of the 23rd inst., addressed to president Spencer has been referred to me for reply.

"The construction of a line in the territory mentioned by you is now under investigation and consideration, but no final conclusions have been reached. Conclusions in the matter would be greatly facilitated if we could be advised from time to time of actual developments which parties in control of the lands contiguous to such line would obligate themselves to undertake.

"I shall be pleased to hear from you further on the subject.

"Very truly yours, W. W. FINLEY,
"Second Vice-President."

That the interview with Dotson at the Hotel Henry was subsequent to the receipt of the letter from Mr. W. W. Finley of date Aug. 29th, 1902; that witness and plaintiff had the Finley letter at the interview at the Hotel Henry but did not show it to Dotson; that while we had our own ideas that no railroad would be built we were given to understand by Milliken that a *bona fide* agreement existed between Dotson and Spencer, and Mr. Dotson's conversation at the meeting gave us to understand that such agreement did exist, though not in writing; that we did not acquaint Dotson with the fact that we had received the letter from Finley; that we refused to take the matter up on Dotson's letter in October, for the reason that we had purchased and begun operations in another field; that we abandoned the proposition to purchase the Harlan County lands sometime after the meeting with Dotson and Milliken at the Hotel Henry; that the failure to produce evidence of the agreement
34 to construct the road had everything to do with the decision not to purchase; that we would not buy without sufficient evidence that a road would be put in; that we decided at once after the meeting at the Hotel Henry to abandon the idea of purchasing the land.

WILLIAM W. FINLEY being produced by plaintiff's counsel testified that he is the Second Vice President of the Southern Railway Company; that he has in his possession a letter without date signed by William A. Milliken; produces letter; that he has also a letter

dated Sep. 22, 1902, signed by N. B. Dotson addressed to C. P. Perin; produces letter; both letters simply identified; that his recollection is that the letters came into his possession and were handed to him by Mr. Perin during a conference in New York City, at the office of the Southern Railway Co. on Sep. 23, 1902; cannot give the names of all parties present at the conference; Perin was there; those were all the letters handed to witness at that time; other letters are on the company's files upon the subject; letter from Perin to Fourth Vice-President produced; also letter from Dotson to Spencer of Sep. 5, 1902; identified; witness is unable to state whether Milliken did or did not have interviews with him upon subject of building the branch railroad into Harlan County, Ky.; the matter was drifting along and he does not recall conferences with Milliken about it, particularly; his impression is that Milliken was not at the New York conference; did not see him; Perin was present; thinks Easter was not; that witness' recollection of the parties present at the conference of Sep. 23 is not clear as to specific parties outside of Perin; somebody represented the Harvester people; only stating recollection when he says Milliken was not there.

35 WILLIAM A. MILLIKEN, the plaintiff, was produced and testified in his own behalf, that he understood from Mr. Waterman's office that Dotson had 124,000 acres of coal land in Eastern Kentucky which he wanted to sell; in the latter part of April, 1902, Waterman said he would write Dotson in regard to it; witness also wrote Dotson and received an answer; Dotson wrote the first letter and came here on the 30th; identifies signature to letter of April 24, 1902, as Dotson's and says it was the first communication; two typewritten circulars or prospectuses came with the letter; letter and circulars or prospectuses offered in evidence for plaintiff, and are in the words and figures following:

"(W. A. M.—"A.")

"Virginia Coke & Steam Coal Co.

"(Incorporated.)

"Paid up Capital $100,000.00.

"N. B. Dotson, President.

"Wise, Va.

"APR. 24, 1902.

"Mr. W. A. Milliken, 1741 F Street N. W., Washington, D. C.

"DEAR SIR: I am just in receipt of a letter from Mr. Franklin Waterman of your city, requesting me to send you description of our coal lands, which I herewith enclose together with circular letter which will explain to you what we want to do with the property. We have arranged with R. R. companies to build a branch into it and develop the lands. We want to find a good responsible party who will take or purchase one half interest in the property at the

rate of $17.50 per acre for the property and develop it jointly with us. Developed properties adjoining this of the same character are worth $300 per acre—other adjoining property with coal and coke plants on it could not be purchased at even greater figures than this. We believe we have one of the finest coking and steam coal properties in the south. If you are interested we would be glad to see you at an early date, as we have arranged for a meeting with R. R. officials the latter part of May in New York and want to complete our arrangements for the taking over and development of the property before that time, as we would want our associates—or interested with us in the proposition, to be present at our meeting with the R. R. people, with a view of closing a contract with them for building branch roads into the property. I will be at Waldorf Astoria Hotel, N. Y. Sunday evening and Monday and if you could make it convenient to be there at that time would be glad to talk the matter over with you personally.

36

"Yours truly,

N. B. DOTSON."

36½

Virginia Coke & Steam Coal Co.

(Incorporated)

Paid up Capital $100,000.00.

N. B. Dotson, President.

Wise, Va

———— —, 1902.

DEAR SIR: We have one of the finest coke and steam coal properties in the South, of which we inclose you a brief description. The surrounding properties have been purchased and developed on extensive scale by Eastern syndicates. The Virginia Coal and Iron Company owns over 100,000 acres adjoining our tract, with over 1,000 coke ovens and extensive coal plants on it. The Virginia and Tennessee Coal and Iron Company owns over 50,000 acres near by, with 1,000 coke ovens and a number of coal mines on their property. The Dorchester Coal and Coke Company owns a considerable tract near ours, with 500 coke ovens and coal mines in operation. The Crane's Nest Coal and Coke Company owns over 100,000 acres near this tract, with extensive coal mines, and are now arranging to build a large number of coke ovens on their property. And a number of other small operations are mining and shipping a large amount of coal daily for steam and export trade.

The coal and coke produced in this field is equal to any in the United States, and has a world-wide reputation on the markets as a steam and coking coal.

This property is in close touch with five lines of railroad. It is one of the very finest in this field. We have opened on these lands ten distinct seams of as fine coking and steam coals as there is in America, aggregating a thickness of over fifty feet.

We have an understanding with the railroads near the lands, by which they are to build a branch into the same for us as soon as we are ready to open up coal mines and put in coke plants.

We now want to sell an interest in the lands, or raise money on the lands by first-mortgage bonds or deed of trust, to develope them. Would prefer to develope the property jointly with a good, practical coal company; or will sell part, and develope the rest individually.

If you would consider a proposition, or could suggest some way in which you could be interested in this proposition, we will be glad to hear from you.

VIRGINIA COKE AND STEAM COAL COMPANY.

(Dictated by D.)

37 Ex. W. A. M. C.

Black Mountain Coking and Steam Coals.

124,000 acres, located in Letcher and Harlan Counties, Ky., along the north side of the Black Mountain, on the waters of the Cumberland River. The Virginia State line is the southern boundary of these lands; the top of the Black Mountain is the State line between Virginia and Kentucky. Along the Virginia side of the Black Mountain adjoining these lands, in Wise County, Virginia, near the Kentucky line, are located extensive coal and coke plants,—the Stonega plant, with 1,000 coke ovens in blast; the Dorchester plant, with some 500 ovens in blast; and the Looney Creek, with some 300 ovens in blast. All of these plants are located on the opposite side of the Black Mountain from this property, having a combined daily capacity of 3,600 tons of coke, and 5,000 tons of coal.

1400'

The same seams that are being worked at the above plants extend through the mountain and are opened in many places on this property, and are well developed. From these coals a coke is made fully equal to that of the Connellsville, Pa. coke.

450'

Upon investigation, this will be found to be one of the most desirable coal properties in the South. The lands have been grouped together by careful and competent men, and well-selected, and located in the very heart of the finest coking and steam coal fields in America.

Coal 7 feet.

Prof. John R. Procter, in charge of the Kentucky State Geological survey, in his report on the coals of this property says:

75'

"The accompanying general vertical section will give an idea of the relative positions of these coals found in this section, and are excelled by none, because of their purity, thickness of seams, continuity, and location for cheap drift mining, with natural drainage, etc.

Coal 11 feet.

2" &5"

55' parting. Coal 5 feet solid. 70' Coal 5 feet 20' solid. Coal 4 feet 35' solid. Coal 40' 4 feet solid Coal 6 feet. solid.

The following is analysis taken from a fair average seam of the coal, which demonstrates its excellency. The Elkhorn seam, or No. 1 in this section, has a thickness of 87 to 97 inches, separated by a thin parting near the middle, which makes it an excellent seam of coal for mining. The seams in this field are regular, undisturbed and continuous throughout the field and of superior quality, and noted for number and thickness.

Analysis.

	Coal.	Coke.
Fixed Carbon	63.83	94.040
Volatile Matter	31.67	564
Ash	2.88	4.744
Sulphur	.68	.068
Water	——	.069

(Signed) JOHN R. PROCTOR."

38 We have other different analyses of these coals by geologists of high standing, such as Prof. Andrew S. McCreath, of Pennsylvania, etc., which show equally as good as that of Prof. Proctor above given.

There are to be seen on this land ten distinct seams of coal underlying this property, above water, and can be worked with self-draining mines, and aggregate a thickness of over FIFTY FEET OF COAL, which over the entire area would give, with all due allowances for coal supports, waste, etc., 58,000 tons per acre. At the lowest royalty which is paid in this field for similar coals, it would reach a revenue of $5,800 per acre, basing it on 10 cents per ton royalty; and should the owners of the property desire to erect their own coke ovens and coal plants and engage in the mining of coal and manufacturing of coke, much larger sums would be realized.

Railroads.

There are now three railroads within ten miles of this property,—the L. & N., the Southern, and the Virginia & Southwestern roads,—and the junction of the L. & N. and N. & W. roads is within fifteen miles of the property on the east. The valley of the Cumberland River affords an easy and low grade for a railroad to connect with either of the above lines, which can be very easily and cheaply constructed, the work being very light. To build through the Cumberland valley a line fifty miles in length, would pass through the centre of the property, and form connections with the Southern and L. & N. on the west, and the Virginia & Southwestern, and also the proposed

line of the Seaboard Air Line, on the east, connecting with the Southern, thus affording this property unsurpassed railroad facilities for shipping coal and coke to the Great Lakes and the Northwest, and to the seaboard at Norfolk, Wilmington, and Charleston, for export or steam trade, with competing railroad systems to haul the coal and coke to both the Northwest and the Great Lakes, and the Atlantic Coast.

The above roads would be glad to extend branches into this property, upon the assurance that the property would be developed on large scale; but it would be far better for the owners of the property to construct and operate fifty miles of railroad, to be built and connect with the several roads above referred to. The L. & N. and Southern could be reached by a short line of ten miles from this property, and from ten to fifteen miles would reach the N. & W. Railway and proposed line of the Seaboard Air Line or C. & O., the L. & N. line having been surveyed through this Cumberland Valley, and also other roads not above referred to, which we deem not necessary to mention, as the above are all that could be desired in the way of railroad transportation. The L. & N. and Southern Railways have both offered to build into this property at once.

Timber.

These lands are covered with good timber, and the trees grow tall and nice, and the property will cut something like 5,000 feet per acre, largely of white-oak, poplar, and some walnut, with considerable maple and other hardwoods. The timber alone, after a railroad is built through the property, is almost worth the price asked for the land, to say nothing of the coal, in which its real value consists.

39

Titles.

The titles to these lands have been carefully investigated, and are considered good. The local owners from whom these lands were purchased have been in possession, and they and their grantees have held the lands in possession for thirty to one hundred years, and it will be remembered that fifteen years gives title in Kentucky, absolutely good. We desire to emphasize the fact that the titles to these lands are not based on any "Wildcat" or "Blanket" surveys, which have been a great source of trouble to this State's development. This boundary of land has been made up by grouping together a number of smaller farms, purchased from actual owners and occupants of the land.

This is a rare opportunity for an investment, and such as does not often occur. Finer coking and steam coals are not found in America, and location for railroad transportation could not be excelled. The very low price at which the property is now offered renders it a rare chance of securing a vast fortune from a small investment, as the price is very insignificant when compared with the real value of the property. Any practical man will readily appreciate the value of this property upon investigation.

An early investigation would be greatly to the interest of those desiring such a property. The property will not stay on the market long at its present price.

The coal is well opened most all over the property, and renders a thorough investigation very easy. A few days horse-back over the property would give any practical man an intelligent idea of it, as to coal-bearing, quality, etc.

40 The property having been made up by grouping together smaller tracts, it will be sold in any size tracts to suit purchasers, and can be laid off and sold in separate blocks, so as to render each block desirable and well located for coal and coke plants; or it will all be sold together at a low price and upon reasonable terms.

If, upon investigation, this property is not found as represented, we will pay the actual expenses of investigation.

VIRGINIA STEAM COAL COMPANY.

41 That he was to meet Dotson on April 30, at the New Willard Hotel in answer to a telegram, but met him at Waterman's—found him there with Judge Hazelton and Waterman; that he told Dotson he had been through that section several years before and knew the land quite well; that he knew its value, but the important thing was about the railroad—whether there was any way to get the property to market; that Dotson told witness that he had an arrangement with Spencer of the Southern Railway to build a road in there from Middlesboro at once; that at that time they had their surveyors in there and were locating a line of road from Middlesboro to Harlan Court House, which is just at the edge of the land; that plaintiff and defendant made an agreement then that defendant was to go to Pittsburg and secure a purchaser for the property at $20.00 per acre, and that defendant would give plaintiff $2.50 for every acre he could sell, in such quantities as he could find a purchaser for; that plaintiff was to pay his own expenses; plaintiff would not have gone into the matter without the railroad assurance, because he had known the land for several years, and there was no way to get the coal out unless there is a railroad there; Louisville and Nashville Railroad is 20 or 25 miles away and it is almost impossible to get through the mountains that way; the other way is to build a branch road from Middlesboro to Harlan Court House, about 45 miles; that was the road Dotson told witness he had an arrangement with Spencer to build; that he would not have undertaken to find a purchaser for a moment if he had thought there was any question as to a railroad because without it he could not and would not undertake to sell the land; that the coal could not

42 be gotten out or to market without a railroad; that a handful of coal might be hauled out at a time with a wagon, but coal could not be marketed without a railroad; that when he made the agreement with Dotson he left and went to Pittsburg that night and began negotiations with Pittsburg people for the sale of the property; the first question asked was in regard to the contract with the railroad, and witness stated that he had not made the contract, but that Mr. Dotson had represented to him that he had an arrangement

with the railroad people; thereupon Easter of the Tri-State Coal and Coke Co., the party with whom witness was dealing, insisted that plaintiff should have something in writing from Dotson; that he then wrote to Mr. Dotson and received a communication from him dated May 3, 1902, which is offered in evidence by plaintiff and is as follows:

"(W. A. M. Ex. "D.")

"The Waldorf-Astoria, Fifth Avenue, 33rd and 34th Streets and Astor Court, New York, May 3d, 1902.

"Mr. W. A. Milliken, Pittsburg, Pa.

"DEAR SIR: I have your valued favor of the 2nd inst. there is no doubt but that your parties will be more than pleased with the situation if the look at over 124,000 acres of coal lands there is no better coal proposition in the market. One thing you want to impress upon them however is that they must not compare this with low priced lands of West Va. and Ky. The situation as to this tract is different and the only thing your people have to do to appreciate the value of the property and know that the price asked for it or the interest in it is insignificant as compared with the value of the — it this is the property which will be developed by the building of R. R. through it at once which will increase the value of it several times over.

"I have no doubt from what you say of your people they are the kind of people we would be glad to have interested in the proposition, and I have no doubt but that we will can easily come to satisfactory understanding with them with little trouble when they have seen the lands. Could you not have your parties come to New York or meet me in Washington on my way back it will be
43 Tuesday before I get through here and Wednesday before I get back to Washington. I hope you can come here as I am pressed for time and want to get back to Va. as soon as possible to get deeds delivered for the tract there to the Cranesnest people as they are in a hurry.

"Yours truly, N. B. DOTSON."

That plaintiff sent a telegram to Dotson on May 8, which is offered in evidence by plaintiff, and is as follows:

"Waldorf-Astoria Hotel.

"PITTSBURG, PA., *May* 8.

"N. B. Dotson, Waldorf.

"See Spencer and write me tonight how much development he will require before building road into property. Would two hundred coke ovens be sufficient to start with. Your wire received too late last night to write you.

"W. A. MILLIKEN."

That the Pittsburg people were not satisfied with what had been stated to them, or with Dotson's letter, and the telegram was sent; they were afraid there were some conditions in regard to building the road; plaintiff could not persuade them that Spencer would build the road without requiring some conditions, and insisted that plaintiff should write Dotson to find out what conditions, if any, attached; that by Pittsburg people he means the Tri-State Coal and Coke Co., represened by Easter, Wilson and Judge Potter; that plaintiff received a letter in reply from Dotson to the telegram of May 8, also dated May 8; that plaintiff showed Dotson's letter of May 8 to Easter and he read it over and seemed satisfied with it; that he then agreed with plaintiff that if he would procure samples of the coal off the property and bring them to Pittsburg so that he could have them coked to see if they would make good coke, he would take the matter up; plaintiff went, accompanied by Mr. Mason, a friend, to Wise County, Va., reached there May 16; the defendant furnished
44 a guide and they went on horseback over the mountains into Kentucky; spent a week examining various coal openings and arranged for the samples for coking; got back to Pittsburg May 27; samples were coked in the ovens of the Tri-State Coal and Coke Co.; plaintiff had a chemist of Pittsburg analyze the coke and coal; first analysis not satisfactory; second was better; sent printed copies of analysis to Dotson at his request; Easter, Wilson and Judge Potter then agreed that Easter and their mine expert Humphrey should go with witness to the property and go over it. They seemed pleased with the analysis and witness felt confident he would make a sale; Dotson was sick, but sent horses down for us and we went over the mountains and spent a week examining the lands; it rained terribly and the examination was not very satisfactory; Easter and his expert returned; witness met Dotson at Wise; continued to work with Easter expecting to arrange it; he promised to get another expert; Dotson was to have the mines opened and better developed; there was a good deal of correspondence and telegraphing between Dotson and witness; arrangements were made in July with Easter and Wilson that Kuhuntz would go down; met Wilson down there; Dotson was with witness; then took the gentlemen over the mountains on horseback; examined the land at Stonega and Dorchester; then examined the land and mines on the Kentucky side of the mountain; they became satisfied as to the quality of the land, coal and timber, and of the coking quality of the coal; returned to Pittsburg; reported result of investigation to Dotson; continued working with Easter, Potter and Wilson until they finally made up their
45 minds to take some of the property—10,000 acres; instructed witness to write Dotson and make the contract; witness had no authority from Dotson to sign his name or make a written contract for him; telegraphed Dotson and received answer that he would come in a day or two; Dotson reached Pittsburg on Sep. 3rd at night and stopped at Hotel Henry where witness was; made an arrangement for him to meet Easter and Wilson; met next afternoon at witness' room, Hotel Henry, and spent an hour going over the papers; they said they were ready to take 10,000 acres, but they

must have assurances in regard to building the railroad; Dotson said he had simply a verbal arrangement with Spencer but that he could get a letter from Spencer saying he would build a road through there at once, and also said engineers and surveyors were then locating the road up to Harlan Court House and there could be no question that the line would be built at once; Easter and Wilson said if they could get a letter from Spencer it would be satisfactory; after adjournment Dotson asked witness if he would go to New York, see Spencer, and get the letter; witness went to New York and found that Spencer was in Europe; witness told the Tri-State people the situation and asked them to give him (witness) a little time before they decided not to take the property or to abandon the work—to give him time to get a letter from Spencer, and they agreed to do so; plaintiff then came to Washington to meet Dotson and arranged with him to go to New York on the 20th or 21st of September to see if Spencer had returned, and to try and arrange the matter; on the 22nd we met in New York at the office of Mr. Perin, No. 3 Wall Street; Spencer was still absent; Perin and Dotson asked plaintiff to write a letter to Finley to see if an arrangement could not
46 be made with him to give the letter stating that they would build the road; he wrote the letter and gave it to Dotson, who told witness he filed it with Perin's letter with Mr. Finley; the letter was discussed by Dotson, Perin and witness; the next day witness had a talk with the Harvester people at Perin's office; plaintiff says that the whole question then seemed to be to get a letter from Finley that the railroad would be built; that it was ascertained that Finley could not make any such arrangement himself and that he had sent a cable to Spencer to get authority; plaintiff got back to Pittsburg on Sep. 30 and reported to the Pittsburg people and got back to Washington Oct. 1, after having given his entire time for five months to the work, and paying his own expenses and those of the expert; Dotson assured plaintiff that as soon as Spencer got back there would be no question about getting the letter, but it failed; plaintiff got a notice from the Pittsburg people in the latter part of October that they could not wait any longer and that they were making arrangements for other coal lands; after Spencer got back plaintiff went to see him and was told by him that he had made no such arrangement with Dotson—that Dotson had misunderstood him; plaintiff then wrote to Spencer and enclosed Dotson's letter of May 8, and Spencer answered that there had been some misunderstanding—that Dotson had misunderstood him; plaintiff gave his whole time to the work from May 1 to Oct. 1, 1902; plaintiff first got into communication with the railroad company about the alleged agreement after October; he wrote a letter to Spencer in May, but did not send it. Letter of Dotson to Milliken of May 29, 1902, offered in evidence by plaintiff, as follows:

47 "W. A. M. No. 1.

"Virginia Coke & Steam Coal Co.

"Incorporated. Paid up capital

"$100,000.00. N. B. Dotson, President.

"Wise, Va.

"MAY 29TH, 1902.

"Mr. W. A. Milliken, Pitts., Pa.

"DEAR SIR: Upon receipt of your telegram I sent a man at once to Appalachia to see that the coal had been shipped. I found that Mr. Blair had brought the coal there on last Saturday, and delivered it to the express agent supposing it would be shipped at once, but when my man arrived there yesterday he found the coal still in the depot, but he at once got after the express agent and the samples were sent out immediately. I am sorry of the delay in the shipment of the coal—it was shipped in four boxes number 1, 2, 3 and 4 respectively—one box was taken from each opening as directed by you. I hope the samples will go through promptly and you will receive them not later than tomorrow anyway. The coal was directed to the Tri-State Coal and Coke Co., Pittsburg, Pa.

"I presume I will hear from you as to the result of the samples shipped from Kelly View at once.

"Yours truly.

"P. S. I understand the Southern Ry. Co. has secured their right of way with the exceptions of through one or two tracts from Middlesboro to Harlan C. H. I hope however, Mr. Spencer will call his men out and keep them out until we get our tracts rounded up as we have requested him to do. I presume your people will be in a position to give us an definite answer as soon as they have tested the coal. We have another proposition from another party wanting an interest over there and would like to have your people conclude as soon as possible.

"N. B. DOTSON."

Letter of June 12, 1902, Dotson to Milliken offered in evidence by plaintiff, as follows:

"EXHIBIT W. A. M. No. 2.

"Virginia Coke & Steam Coal Co.

"(Incorporated.) Paid up Capital $100,000.00.

"N. B. Dotson, President.

"Wise, Va.

"JUNE 12TH, 1902.

"Judge W. A. Milliken, Pitts., Pa.

"DEAR SIR: I have your favor of the 9th inst. I am glad the coal and coke are entirely satisfactory as I was sure it would be. The

engineers are now locating the line of the Southern into the
48 property. It would not be necessary for me to accompany Mr. Easter to see Mr. Spencer, as Mr. Spencer's plans are already fixed, he would not hesitate to say to Mr. Easter that they will build the road into that section at once. I think I will be at home all of this week. If I should be away any telegram you may send will be promptly forwarded to me.

"There are a number of people now after coal lands in that section and I believe if your people want the property they will find it to their interest to take prompt action in the matter.

"Yours truly, N. B. DOTSON."

Letter of July 8, 1902, Dotson to Milliken offered in evidence by plaintiff as follows:

"Virginia Coke & Steam Coal Co.

"Incorporated. Paid up capital

"$100,000.00. N. B. Dotson, President.

"Wise, Va.

"JULY 8TH, 1902.

"Judge W. A. Milliken, Pitts., Pa.

"DEAR SIR: Your telegram of yesterday advising me Mr. Ingrahm had offered our property in Pitts. at $15 per acre was received and answered. When we first placed the property on the market we did offer it at this price, but after we completed arrangements with the R. R. Company for the development of the property, we advanced price to $20 per acre and in naming price now to any new parties we are even naming a much higher figure than $20. If your parties act promptly however, without too much delay we will maintain the price named you of $20 per acre, but the R. R. is now located to near the property and work will soon be vigorously pushed and of course price will very soon be higher. As soon as R. R. is completed the property will be worth several hundred dollars per acre, and the price is very insignificant we are naming on the property as compared with its value.

"Yours truly, N. B. DOTSON."

Letter of July 9, 1902, from Dotson to Milliken, offered in evidence by plaintiff, as follows:

"EXHIBIT W. A. M. No. 4.

"Virginia Coke & Steam Coal Co.

(Incorporated.) Paid up Capital

"$100,000.00. N. B. Dotson, President.

"Wise, Va.

"JULY 9TH, 1902.

"Judge W. A. Milliken, Pitts., Pa.

"DEAR SIR: I have your favor of the 7th instant. I wrote
49 you yesterday stating that nothing less than $20 per acre would buy our Harlan county coal lands—and also wired

you the same; and if your parties get advantage of this low price they will have to act promptly, as R. R. will soon be built and the price will advance greatly. How much do your people want? Do they want the entire tract or do they only want part of it? If you will let me know the exact number of acres they want to purchase, if they find the coal satisfactory upon further investigation, I will place you in position to give them refusal of the property for sufficient time to look it over and say whether or not they want it. Please bear in mind, however, that I have arrangements completed for taking over the lands, and will want to begin taking over deeds at an early date.

"We are now having titles abstracted, surveys made, &c., and no long option will be given on the property. Appreciating the amount of work and expense you have been to in trying to handle the property, we will give your people time to look the property over and give us a definite answer as to whether or not they take it. They, however, must act promptly as we have other arrangements completed in case they do not care to take advantage of the offer.

"I think it will pay you to see Mr. Greer at once, about whom I wrote you a day or so ago.

"As business men I do not think they should pay any attention to statements made by other parties that they can buy the property at lower figures. I hope however my letters to you of yesterday were sufficient to satisfy your people and that you will have no further trouble along this line.

"I leave for the west to-day and will be gone until the first of next week. The coal openings will all be in good shape by the time I get back and you need not hesitate to bring your engineer on at once.

"Yours truly,

N. B. DOTSON."

Letter of Aug. 26, 1902, from Dotson to Milliken, offered in evidence by plaintiff, as follows:

"Virginia Coke & Steam Coal Co.

"(Incorporated).

"Paid up Capital $100,000.00.

"N. B. Dotson, President.

"Wise, Va.

"AUGUST 26, 1902.

"Judge W. A. Milliken, c/o Hotel Henry, Pittsburg, Pa.

"DEAR SIR: Your telegram informing me that your parties have decided to take ten thousand acres positively, and possibly twenty thousand acres, is received. I presume you will have heard from Mr. Spencer before this time, and you will be down at once to close the matter up. We are about to make a deal with other parties over there, and it is important to you that your parties act promptly in the matter. I presume, however, I will receive your letter today or tomorrow explaining the deal fully.

"Yours truly,

N. B. DOTSON."

Letter of no date from Milliken to Finley offered in evidence by plaintiff as follows:

"W. W. Finley, Esq., 2nd Vice President, Southern Railway.

"DEAR SIR: The Tri-State Coal & Coke Co. of Pittsburg, Pa. contemplate purchasing, *for the purpose of immediate development,* about 10,000 acres of Coal Lands on Big Black Mountain, on the head waters of Cumberland River in Harlan County, Kentucky. There is a letter from this Company to your President, Mr. Samuel Spencer, to this effect, written several weeks ago, which is doubtless on file in his office.

"This Company proposes to open coal mines, build coke ovens, and establish at once the business of mining coal and manufacturing coke on this land, *provided that* a Railway is constructed from some point on the Southern Railway in Bell County, Ky. between Middlesborough and Pineville, Ky. to Harlan Court House, and up Clover Fork or Poor Fork of Cumberland River to the lands proposed to be developed. This Company has caused said lands to be carefully examined by its Engineers, and, with the understanding that Mr. Spencer, the President of your Company, had verbally agreed to build the proposed branch line to Harlan Court House, it had decided to purchase *the* develop same. It now desires an agreement from your road to build this branch, and on condition of your doing so, it will agree to complete the purchase of the 10,000 acres, and to begin immediately the development of same on the lines above set forth.

"There is another syndicate of Pittsburg coal men, who contemplate purchasing 20,000 acres of this coal land on Big Black Mountain in Harlan County, Ky. for the purpose of development on the same lines as the Tri-State Coal & Coke Co. *provided* this branch road is built by your Company. I feel safe in assuring you that these two concerns will furnish at least fifty car loads of coke daily, for transportation over your line when built, besides a large amount of coal.

"I went with these engineers to examine these coal lands and they made a most thorough and critical examination, and I can assure you, in my opinion, it is the *equal* of the Connellsville coal district of Pennsylvania, where coal lands are today selling at $1,250.00
51 per acre. Coal from these lands was taken out and shipped to Pittsburg and made into coke, and upon analysis by Dr. Otto Wuth of that city, pronounced the equal of any coke known. He states in his analysis "It would be impossible to produce better coke than this for Foundry use."

"You will pardon me if I take the liberty to state that your Company cannot find a point on your line where you can secure as fine business, as you will be building this branch to Harlan. This field comprises about 30 by 20 miles square of coking coal lands that will average at the lowest 10,000 tons of *coking* coal to the acre. It is destined to become one of the greatest coke producing districts in America.

"Yours truly, W. A. MILLIKEN.

"(Lead pencil memorandum: Copy sent President 2/18/03 by H. G. W.)"

Letter of Sept. 22, 1902, from Dotson to Perin, offered in evidence by plaintiff, as follows:

"Kinsley's Chicago.

"Established 1865.

"Holland House.

"SEPT. 22, 1902.

"Mr. C. P. Perin, 35 Wall St.

"DEAR SIR: We have control of 100,000 acres of coal and timber lands in Harlan County, Ky. on the waters of the Cumberland River. A good part of this you have examined in the selection of your 30,000 acres for your company. The Tri-State Coal and Coke Co. have also examined a good portion of the lands and they have made tests of the coal and coke and found it perfectly satisfactory, and have agreed to purchase 10,000 acres and put in coal and coke plants. The Virginia Coke & Steam Coal Co. will also develop a portion of the lands and operate coal and coke plants thereon. Besides there are a number of other good reliable coal companies who will take considerable interest in the field and put in and operate coal and coke plants—all of which I explained to Mr. Spencer, President of the Southern Rd. Co. sometime ago, in an interview I had with him,—with reference to the building of a railroad into that section, which I thought at the time was satisfactory to him and the road would be built. I hope he is still favorably impressed with the proposition and will build the road for us, as I feel sure he will. There is no doubt about the development of this field on an extensive scale as soon as the railroad is built, which will undoubtedly be worth a great deal to the Southern Railway Company. Other soft coal companies are now making investigations of the fields selecting locations for coal and coke plants, all of which it seems to me should be sufficient evidence to the Southern Railway people that
52 the field will be quickly developed and a vast amount of coal and coke produced there, if they build the railroad into the property. The people interested in the development of this field are reliable coal companies, and not speculators, and their purpose is to develop and operate the property and not to sell to someone else for a profit.

"Yours truly, N. B. DOTSON."

That plaintiff made his contract with defendant on April 30, 1902, in the presence of Judge Hazelton and Mr. Waterman; that he went to Pittsburg and met there Easter, Wilson, Potter and Kuhns; that his visit to them was for the purpose of making sale of the land; that he carried the prospectus with him and used it—had it at the interview; that the proposition was to sell them the whole 124,000 acres if they would take it.

Letter of April 25, 1902, from Milliken to Dotson offered in evidence by defendant as follows:

"WASHINGTON, D. C., *April 25th*, 1902.

"N. B. Dotson, Esq., Wise, Va.

"DEAR SIR: Your favor of the 24th with enclosures is to hand and contents noted. I understand from Mr. Waterman that you desired to sell the property outright. I had submitted the matter to some coal people in my office this morning from Pittsburg and have arranged to meet them Monday in Pittsburg. Since receiving your letter I see that you simply wish to sell a half interest in the property with the understanding that the purchasers are to join with you in the development of the property. If you can delay your trip to New York until Wednesday next, so that I can go there from Pittsburg, I will meet you at the Waldorf-Astoria on Wednesday evening at 8 o'clock, and will be in a position by then to know exactly what the Pittsburg people will do.

"Yours truly, W. A. MILLIKEN."

Letter of May 2, 1902, from Milliken to Dotson offered in evidence by defendant as follows:

"MAY 2ND, 1902.

"N. B. Dotson, Esq., New York.

53 "DEAR SIR: I find only one of the gentlemen I came to see. The other two are absent until to-morrow. From my conversation with this one I do not think there will be any question as to their taking the property, if they do not balk at the price.

"The best quality of what is know- as Freeport, and Pittsburg coal land lying in W. Va. is selling here at from $12.50 to $15 per acre, undeveloped. This Freeport and Pittsburg Coal is as you probably know unexcelled as steam and coke-ing coal. If you could put the price of the 124,000 acres at $15 I could say to you as a certainty it would be taken here. I did not mention, in my interview, the price of the land, but gather the above impressions from what was said to me as to the price the West Va. lands were selling at.

"I am satisfied also, that the best way will be for you to sell the entire tract, to this crowd here and then take in part payment so much of the capital stock of their company, and balance in money, and require in the contract of sale that no Bond or Mortgage shall be placed on the property except with your consent. There will be two advantages in this method. It will satisfy these parties that you yourself have confidence in the outcome of the property and it will satisfy their demand to control the development of it.

"These are business people here, and thoroughly understand the coal business in all its stages. They know what they want and have all the money they need to pay for and develop it.

"These other two gentlemen will be back tomorrow, and I have agreed to wait here until Monday, in order to go over the proposition with them fully.

"In the meantime if you can reduce your figures to $15. for the entire tract of 124,000 acres write me by return mail and I think we can make a deal for it, in short order.

"I shall remain here, therefore, until Monday night at least.

"If I can close the sale, you will have to come here, of course, to sign the contract.

"Yours truly, W. A. MILLIKEN."

Letter of May 7, 1902, from Milliken to Dotson offered in evidence by defendant as follows:

"MAY 7TH, 1902.

"N. B. Dotson, Esq., Wise, Va.:

"I infer from your letter of yesterday that you have left New York, and hence I write you at home. I have the two parties I wanted, interested in the Land deal, and they are now at work among their friends to enlist the necessary capital. I would not be surprised if they got ready to send a coal expert down next week to examine the property:

54 "You, of course, will have to go with him and show him the property. I am writing to Smith of the L. & N. and Spencer, of the Southern, to know if they will build the road in there, as soon as we are ready to begin the development of the property. These gentlemen are thorough coal men and know all about the business. They want to know positively about the railroad being built in there, if they go into it. I feel satisfied from my interview yesterday and again to-day that, the deal will be made, if the expert they send down reports the coal all right as you have represented in the statement I handed them.

"I am working it on the basis of their taking 55 per cent. of the capital stock at par, and you 45 per cent.

"With great confidence in the transaction, I remain.

"Yours truly, W. A. MILLIKEN."

Plaintiff states that he was negotiating with people, not Tri-State Coal & Coke Co. people, with the idea of forming a new company of capitalists; Easter and Wilson were not among them; that he suggested to Dotson that that would be the easiest way to carry it through; that Dotson's statement in Washington had satisfied plaintiff about the railroads; that he wrote Smith of the L. & N., and Spencer, of the Southern, as stated in his letter of May 7, 1902, for the reason that these people did not know the property, and plaintiff had no communication with the railroads, and they insisted that he have something from Smith and Spencer, as plaintiff knew them both personally; they would not rely on plaintiff's statements and unless he had something back of it they would not make the deal; plaintiff had not made the arrangement with Spencer and could not say of his own knowledge that such an arrangement had been made; that an assurance from Dotson would have been satisfactory, and was satisfactory when it came; plaintiff wrote inquiring whether the road would be built because the people he was dealing

55 with wanted something more definite than plaintiff could give him, which was only a verbal statement from Dotson; that he wrote to Smith of the L. & N. to get what they wanted;—a letter from Dotson or Spencer that they would build the road; that he relied on Dotson and did not write to Spencer.

Letter of May 8, 1902, from Milliken to Dotson offered in evidence by the defendant as follows:

"Hotel Henry.

"PITTSBURG, *May 8th*, 1902.

N. B. Dotson, Esq., New York.

"DEAR SIR: I did not receive your wire in answer to mine, until 11 o'clock last night too late to get a letter to you this morning, hence I wire you instead.

"The parties I am working with here, first, Henry A. Lineaweaver, the leading attorney here for several of the largest coal companies of this city and for two of the largest banks and trust companies, next, the Tri-State Coal & Coke Company, which has in its directory and officers some of the wealthiest men in town, they are sufficiently interested in my proposition, to see how many of their immediate friends will join in with them and raise the necessary capital to buy and develop the property. Their opinion is, to first send their own expert to examine the property; if he reports favorably as to the coal, to then form a company of 2½ millions, you to take 45 per cent. of the stock and they 55 per cent. at par. To open one or two mines, build 200 ovens of the modern type and begin operations in this way and see if it will prove as successful as it promises from the prospectus I furnished them. If it does then to go forward and put in as many openings and build as many coke ovens as can be profitably used. The first thing, therefore, which they want to know is, will starting in with one or two mines and 200 ovens, be a sufficient development to induce the "Southern" or the L. & N. to build a branch up through the land. It is for this information that I wired you just now. I trust you will talk it all over with Mr. Spencer and let me know by return mail what he says. I wrote to Mr. Smith at Louisville last night on the point, hope for a reply by Saturday.

"Fortunately for me, the Stonega plant in operation down there near you, is owned by Pittsburg capitalists, and the character of their coal and coke is well known by the people I am working with. If the coal on your property is the same as the Stonega coal, the deal will be a go.

"If you know the cost of mining coal in that section by
56 the ton, mention it in your letter; also the freight rates to Charleston, Norfolk, Louisville, Cincinnati, and south to Birmingham, Pensacola, Mobile, and New Orleans. My friend Lineaweaver is the law partner of "Stone" the present Governor of this State and a man who can reach as much capital as anyone I know of. He knows personally about the coal lands in this section of Ky. and has great confidence in the future of them.

"As far as I can now judge the outlook is most satisfactory for the business.

"Yours truly, W. A. MILLIKEN."

Plaintiff states that Lineaweaver is the man he first went to see when he went to Pittsburg; that plaintiff was dealing with him as

late as May, 1902, and the Tri-State Coal & Coke Co.; that they were trying to form a company and have Dotson retain an interest in it; plaintiff was trying to sell the land to several people; that plaintiff wrote to the railroads at the request of the would-be purchasers; because they insisted they would not build a road in there without conditions.

Letter of May 12, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"MAY 12TH, 1902.

"N. B. Dotson, Wise, Va.

"DEAR SIR: Let me know by return mail to what point must the expert come on the railroad to get at the coal land most conveniently. I suppose to "Norton" or "Big Stone Gap" and ride right over the mountain into this land in Letcher and then follow it down through Harlan would be about as good as any. In your prospectus as to these lands you state that your company will pay the expenses of the expert sent down to examine the lands, if he finds that the representations are not correct, as to the coal and its quality and coking, &c. I hand this prospectus to these gentlemen who have this matter under consideration, and that offer has had great weight in inducing them to take the matter up, and it may be, they will require me to deposit some amount to guarantee the carrying out of this offer. If they do, I will wire you for it, and in meantime, put up the deposit myself. The negotiation has reached this point to-day—'if your coal will make good coke as the Stonega
57 Coal and if the Southern will build a branch line into the property'—the parties here will put the capital into it necessary to develop it. It is all up to you now, as the boys say, to substantiate these two points, which I believe you will do. On the railroad question, however, I have a letter from M. H. Smith, President of the L. & N., and in it he says emphatically he will not build a branch line into Harlan County. He says, 'There are thousands of acres of excellent coal lands on line of this road already constructed, that remain undeveloped, and there is no good reason for constructing additional lines into undeveloped territory.' I quote this language from his letter.

"If, however, you have Spencer safely committed to you, to build in there we do not care for Smith's road.

"Let me hear from you by return mail.

"Yours truly, W. A. MILLIKEN.

Letter of June 9, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"JUNE 9TH, 1902.

"N. B. Dotson, Esq., Wise, Va.

"DEAR SIR: I received Dr. Otto Wuth's report on the result of his analysis of the coal and coke taken from boxes No. 1 and 2, sent by Bair, and I am very gratified to be able to write you, that it was splendid. I left the report with President Easter of the Tri-State

Coal and Coke Company and consequently I am not able to quote you the exact figures, but the Dr. winds up his report by saying, "It is impossible to find better foundry coke than this." Of the coal he says, 'There is no better coal in the market.' The old Dr. told me when he handed me the report that he had never analyzed finer coal than that. I do not think the first samples I took him fairly represented the coal and coke. The time I took him the entire box of coal and coke and had him analyse it, and the result is splendid. I can give you the details in part of his analysis.

	"No. 1.	No. 2.
"Fixed carbon	93.50	94.44
"Sulphur	56	50
"Phosphorus	015	012

"This I give from memory. Will have a copy made to-morrow in full and send you. Easter was astonished when he read Dr. Wuth's report. I did not get it until 4 this afternoon and had to let Easter keep it to talk over with his people. The truth is, he and his people are so overcautious and so afraid of having a gold brick worked off on them that I have to let them take their own time and work and work out the problem themselves. It is difficult for them to believe that anything as good as this can exist outside the Pennsylvania coal fields. He asked me this afternoon if we would
58 give him an option on the land, with the condition that he put in 100 ovens and work the coal thirty days and see exactly what it would do, and if it proved as satisfactory as their analysis indicated, they would buy. I told him I would give him an option on 5,000 acres at $20. on those terms. I am satisfied now that Dr. Wuth's last analysis is going to decide them to take the lands, and I may wire you by the time this letter reaches you to come up here to close the deal. They asked me in particular this afternoon as to how soon the railroad could be built into this land from Middlesboro. Easter asked if he could go and have a talk with Mr. Spencer on the subject, with you. I told him yes. I think they are going to take all this week to chew it over, but they are going to take the land, in my judgment. Easter has been talking with a coal man here, with a view of employing him as manager, to go down there and superintend the opening of mines and building coke ovens. This I learned to-day. Things are progressing slowly, but I think surely. Will send you a copy of analysis to-morrow.

"Yours truly, W. A. MILLIKEN."

"P. S. Do not get out of reach this week for I feel confident I will want you here soon.

"W. A. M."

Letter of July 7, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"JULY 7, 1902.

"N. B. Dotson, Esq., Wise, Virginia.

"DEAR SIR: I have just wired you that "Ingraham" of Philadelphia is offering your lands here at $15. per acre, and asked you to

wire me by what authority he was doing so. This is most unfortunate, coming at this time. Mr. Easter handed me a letter this morning from Ingraham this 124,000 acres of land at $15. per acre and enclosing a copy of the very description of the property which you gave me and which I had already handed to Easter. I could only say to him that Ingraham had no authority to offer your lands at $15. nor at any price, as you had put the matter entirely in my hands, and that the land could not be bought for less than $20. and assured him I would wire you for a direct answer. Until I hear from you, of course, I can proceed no further in the matter.

"They now will require an option for the land from you, before they will go to any further trouble or expense. They are willing to enter into an agreement that they are to have so many days to send their engineer to examine the land, and if he decides the coal is there as set forth in your prospectus, they will take the lands. The question as to the price of course is to be settled. If you have
59 authorized Ingraham to offer it at $15. of course they will not agree to pay more. This I cannot for a moment believe, as you have assured me that the lands must net you $17.50 and that you would not allow them to be offered at less than $20, after I had fixed that as the price. Hence I am — a great loss to understand "Ingraham's" conduct in this matter. If you have even in any way, directly or indirectly, authorized him to sell this property, you cannot withdraw this authority too quick. He is evidently offering it promiscuously to everybody and anybody, as Mr. Easter never heard of him much less knew him—and this will kill the sale of property quicker than anything else. I await with much anxiety an answer from you on this point, so I can be put right with my people here and go ahead with this deal. They are anxious to thoroughly investigate the property, and if the coal is there, to buy it.

"It would mortify me beyond measure to have this whole deal made a mess of by this man "Ingraham." These people are my friends to whom I was introduced by the best men in Pittsburg, and they have absolute confidence in my integrity, and for nothing on earth would I forfeit that respect and confidence.

"I have spent more than two months hard work on this deal and my check book shows I have spent $1,275.00 up to date on it. You must not therefore let this man "Ingraham" jeopardize the whole thing in this way. Stop him at once at all hazards. It is absolutely essential. Write me a letter fully backing me up, and denying that the property can be bought at $20. and denying that Ingraham had any authority to offer it at that price. Then let me know as quick as Mr. Blair has the new coal openings ready or nearly ready for inspection and I will bring the engineer down with me immediately and we can have him examine them and the deal can be closed on our return.

"I hope to hear from you by return mail, setting everything straight in this matter, so I can go ahead.

"Yours truly, W. A. MILLIKEN."

Plaintiff states that an option was given to T. J. Easter on the 24th day of July, 1902, for 10,000 acres of land; that he supposes it was given because the parties would not go on without it; they had some friction and were about to throw the whole thing up, which resulted in giving the option; that at the interview at Waterman's, April 30, the price of the land was fixed at $20. per acre, Dotson to have $17.50, and pay me $2.50; plaintiff after that, fixed the price with Easter at $20; plaintiff requested defendant to enclose a letter to him saying the price of the land was $20 per acre, in order to back him up in his deal.

Letter of July 14, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"Hotel Henry,

"E. E. Bonneville, M'g'r.

"Pittsburg.

"JULY 14, 1902.

"N. B. Dotson, Esq., Wise—

"DEAR SIR: Your telegrams and letters from Chicago, are duly to hand contents noted. The parties here have made up their minds to take the entire balance of 100,000 acres of your lands, lying on Looney Spur, Benhams Spur and Big Black, and their Engineer (who is also one of the largest Capitalists in the Company) will come with me to go over the tract and locate the best points for opening the coal-veins. Judge Potter, who is their counsel & also a large stockholder is now in New York to see Mr. Spencer in reference to *when* he will build the road from Middlesboro up through the lands. Judge Potter is a member of the Supreme Court of the State of Pennsylvania and also a very wealthy man. He already owns some large Timber Tracts just below you, in edge of North Carolina & Virginia, where *he* has built 25 miles of railway from a point on the Southern Railway to his mills, which he is now operating. He is a great believer in the future of that section. From what you wrote me in your letter of June 12th, I take it that Mr. Spencer will talk freely with Judge Potter as to his intention to build this road at once & that we need fear no *hitch* on that point. This is the *only point* now on which any trouble can arise.

"I hope to get off for your town on *Wednesday*—with Mr. Wilson, the Engineer. I neglected to *to* say, that Mr. Easter tells me that his present Company, the "Tri-State Coal & Coke Co.," are going to make this deal, as a Company. Their present charter he tells me is sufficiently broad to cover the case. This will expedite matters very much, as it will prevent the delay necessary in organizing a new corporation. Now in regard to our trip into Harlan. I am satisfied, that the *best way* is to start from "Stonega," & go over the mountain by that road as it is the easiest riding and it puts us in touch with some of the *best* coal-veins, immediately after crossing the mountains. There are 2 fine veins open, just after we get down on the Kentucky side. Then these can be seen on the 1" day out from Stonega. Then comes Vlairs vein, & the veins on Looney Creek

which we can examine the 2d day. Then those on Clover Lick the 2d day, and any new ones you have had opened. Then on
61 the 4th day we can ride down Poor-Fork & examine that big vein of cannel coal near Cornets, and some veins Cornet told me of on Big Black 8 miles below his store—then on down to Harlan Court House. From there it is only some 12 miles good road to the nearest station on the L & N road. This would be the 5th day's work. Mr. Wilson will take longer than this however, as he will have to examine the front of Looney Spur, Benham Spur & Big Black, for the best point to locate coke ovens, and open two or three mines, and also the best points to locate some lumber mills. In order that he may be entirely unhampered as to *living* while in Harlan Mr. Easter has asked me to arrange for a two horse light wagon in which Mr. Wilson can carry a tent, some Hammocks, a few cooking utensils & sufficient provisions for the trip, so that he will not have to stop at any private houses, but just camp out, where he pleases. This will require a *covered wagon* & a pair of mules. I have agreed to arrange for the wagon & mules, & he will provide the tent & other things. He thinks it will require 6 to 8 days' work in there, and he wants to camp out while there. Altogether the entire trip into Harlan & out will require from 8 to 10 days. Wilson is a *worker* and *pusher* however, and if your men have the coal-openings in good shape so that he can readily judge as to the *dip* of the veins, he can very quickly locate the best points to open the mines. They must be opened he says as near the line of Railway as possible.

"Now I want to ask you to secure *two good riding Horses*, for Wilson & myself on this trip. Nothing makes a man feel better, than a *good* saddle Horse—& a *bad* one, is the Devil. I wish to do *everything* we can to avoid any chance for a *failure* this trip. I want Wilson to keep in good trim for *work*, & to be able to fully appreciate the *unequaled opportunity* this coal field offers for capital. Mr. Easter got sick the 1st night after we crossed the mountain, and this added to the Rains and High Waters and the wretched conditions the coal openings had got into, made him anxious to get out of there as soon as possible. He did not get to see more than ½ of the property. But for Mr. Humphreys, the Superintendent who was with him, I think he would have been out with the whole trip. It was very largely owing to the rough-riding Horses we had.

"I have written you fully now as to the arrangements, and will wire you when I start. I find our *quickest route* is by Cincinnati down the L & N to Appalachia & out to Stonega. We can leave here at 8 Wednesday morning & arrive Appalachia at 8 Thursday morning. Here's to the successful termination of this trip.

"Yours truly, W. A. MILLIKEN.

"P. S. You do not feel any doubt as to what Spencer will say—Do you

W. A. M."

62 Letter of Aug. 14, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"St. Charles Hotel,

"Mrs. E. J. Lindsey, Proprietress.

Nearest Hotel to Station—Sixth Street.

Rates: $2 per Day. Sample and Bath Rooms Free.

"NORTON, VA., *Aug. 14th*, 1902.

"DEAR MR. DOTSON: The N & W train left me, this morning, and I have not been able to get a horse to ride over to see you. I have telephoned you, I think I can do more good by returning to Pittsburg, than waiting here—and will leave on the L & N this evening—will reach Pittsburg tomorrow afternoon at 5.40. I will go on up to Wildwood-Springs, where my family are and remain over Sunday. It is just 3 hours beyond Pittsburg. I will see the "Tri-State Coal" people monday in Pittsburg and ascertain just what they have decided on. In meantime if a letter comes for me from them, read it and see what they have to say. I feel quite certain they will take the 10,000 acres—but I shall try to get them to make it 20,000, and let you take 49 per cent in stock of their company— I shall make a move immediately to meet Gov. Stone and his friends and see if we cannot sell them ten or twenty thousand acres, and let you retain 49 per cent of stock in their company also. In this way we can do a great deal better than by your keeping 10,000 acres.

"Mr. Wilson having seen the lands, and being so well and favorably known among coal and coke men in Pennsylvania it will enable me to make much more rapid progress in a second deal in that section, as I feel confident he will give a favorable report as to the coal and its coking qualities, and I will get his permission to refer to him.

"It has been a long and hard pull, but I believe we will come through alright, in this deal. Anything worth having, always requires a hard effort to get.

"I am leaving your Rain-coat and Barometer here with Mrs. Lindsey for you. She will take good care of them until you call or send for them.

"My address at Pittsburg will be "Hotel Henry." Retain any mail for me until further notice and oblige.

"With best wishes, I remain

"Yours truly, W. A. MILLIKEN."

Letter of Aug. 26, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"Hotel Henry,

E. E. Bonneville, Mgr.

Pittsburg.

"AUG. 25TH, 1902.

63 "N. B. Dotson, Esqr. Wise, Va.

"DEAR SIR: I have been 'laid up' for repairs, for the last week, and just got back to this town today. I have met Mr. Easter, and they

have decided to take the 10,000 acres of coal lands, on condition that Mr. Spencer will assure them as to the building of the railroad to Harlan C. H. They have written to Spencer, and stated what they proposed doing, and asked as to the Railroad. So if his answer confirms what you have represented on this point, they will close the purchase for 10,000 acres.

"Now comes a point that brings the matter *up to you.* Mr. Easter has letters from *two* different parties offering *this land* to him at $12.50 per acre, and at $15.00. Each party claims to represent the owners, and each has sent him a copy of my analysis of the coal and coke made by Dr. Otto Wuth, *leaving off my name* of course. Mr. Easter of course wishes to buy the land as low as possible and will consequently try to deal *through* the party offering him the land at $12.50. This I cannot prevent of course but, I have assured him that no one could sell the land under $20.00 and that I had your word to that effect.

"It is a great pity to have such questions arise at this period of our negotiations, but it is the result of your having offered the lands *so promiscuously.*

"Every one you have written to or talked to about them, has considered himself authorized to offer them for sale, as your agent, and done *so.* How they got the price down to $12.50 per acre, is what I do not understand. But what is still more annoying, is that they should be using my *analysis,* and suppressing my name. How did they *get it.* You will understand however, that *no deal* must be made with Easter and his people, the Tri-State Coal & Coke Co. at less than $20.00 and only through *me*—unless *you* are willing to reduce the price on your own account without affecting me. This of course you can do, and I could not object.

"But this would be utterly unnecessary. They have made up their minds to buy the 10,000 acres at $20/00 if they cannot get it for *less,* if Mr. Spencer satisfies them he will build the road. If he does not, they do not want the land at *any price.*

"It is a great pity you cannot *stop* these parties from offering these lands at such prices. It only makes it more difficult to negotiate a sale with responsible people.

"I have investigated the statement that was made to you, that Gov. Stone of Pennsylvania, was trying to buy lands down there; and find it is false. He says he has never had the faintest idea of doing so. No one has any authority to make any such represen-
64 tation. The man "Frost" who told you this is not known to Gov. Stone. I have not heard anything from you since I left. Please forward my mail to me here. I will wire you as soon as Easter hears from Spencer.

"Yours truly, W. A. MILLIKEN."

Letter of Aug. 25, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"Hotel Henry.

"E. E. Bonneville, Mgr.

"Pittsburg.

"AUG. 25TH, 1902.

"N. B. Dotson, Esqr. Wise, Va.

"DEAR SIR: Since writing and wiring you this morning, I have seen Mr. Lincaweaver, and we have another *strong crowd* of Coke men, ready to take the remainder of the 100,000 acres of Harlan Co. lands, at $20.00 upon the strength of the purchase by the Tri-State Coal and Coke Co. They will take Wilson and Kuhns' Report on the coal.

"It is very important for you to have some good openings made right near Harlan, in Big Black Mt. to show that these Coal veins continue through Big Black down to Harlan. Mr. Wilson says two good miners, can take a Barometer and by getting the height of the Creech vein, on Loomey, and that of Davis on Clover Lick, locate those two veins at Harlan in a few days. Can you not have this done *immediately*. I expect to return with Mr. Wilson to close up his purchase, this week, if Spencer replies promptly to Judge Potter's letter, as I suppose he will do. Capt. Tucker could locate those veins for you, & have them opened. I think it is of the greatest importance to have this done this week. We can close the whole 100,000 acres out, if it is done, at once.

"Yours truly, W. A. MILLIKEN."

Letter of Sep. 10, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"Grand Hotel,

"Broadway & 31st St.

"New York.

"William G. Leland.

"SEPT. 10, 1902.

"N. B. Dotson, Esqr. Wise Va.

"DEAR FRIEND: Spencer is in Europe and not to return for several weeks. Shall try to see Mr. Findley the Vice Presid't and see if I can get something satisfactory from him about the Railroad. I will have to remain here all this week I fear to meet Findley.

65 "Yours truly, W. A. MILLIKEN."

Letter of Sep. 19, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"J. L. Robertson, Investments, Financial Agent, 66 Broadway.

"Telephone 2064 Cortlandt.

"NEW YORK, *Sept. 19th*, 1902.

"DEAR Mr. DOTSON—Mr. Perin left last night to see Mr. Findly who is unable to come here. He is expected back by tomorrow morn-

ing. I will wait here and see him, to learn what arrangements are made as to the Railway. It is most important to get these matters closed as rapidly as possible, because there is a world of Coal Lands being offered for sale here and at Pittsburg, at $10.00 per acre and I fear it will ruin the market for them. I have come across 70,000 acres today, with 2 veins of 8 and 12 feet, each, title in fee simple and perfect, a railway running on each side of it, and the *best quality* of coking coal, offered at $10.00. The owner himself is offering it, and is thoroughly responsible. He was just about to take it to Pittsburg, and I have headed it off, for the present. We must get our Railway matter settled at once, and close up the deal with Easter and Alexander at earliest moment, or I fear some of these people here will get in there.

"I leave for Pittsburg tomorrow night, & will come on to Cin. Monday, if Easter & Alexander wish to go there. I hope to get Mr. Perin to stop in Pittsburg Sunday & see them.

"Yours truly, W. A. MILLIKEN."

Letter of Sep. 26, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"GRAND HOTEL, *Sept.* 26, 1902.

"N. B. Dotson, Esqr., Wise, Va.

"DEAR SIR: I met Mr. Perin this a. m. and learn from his conversation, that the feeling of the Chicago People is very strong against you & that they are determined to have the 10,000 acres they selected out of your lands—even if they have to have a lawsuit with you to get it. I told him there would be no necessity for any coercion, as you were more than willing for them to have it, and all they had to do was to tender the money and you would make them the deed. Perin told me you had offered him & them the 70,000 acres in Tenn., but while they would consider the purchase of it from the owner direct, they would not touch it if you had anything to do with it. I am astonished at the very strong feeling entertained against you by Perin, who I thought was your friend. I am exceedingly sorry the deal should have terminated that way. I am going to Pittsburg tonight & will see my friends there tomorrow and sound them on the purchase of the 70,000 acres. Let me hear from you as soon as you know definitely what you can do with Harper after your meeting with him at Big Stone Gap. I may be able to turn Alexander & his people on to the 70,000 acre tract. Will try it at any rate. I feel great regret about the Tri-State Coal Co. for they will be terribly put out when they learn no road will be built to your land, at present. I had Major Robertson write to "The Nat. Bank of Bristol" about you today so as to satisfy "Doremus" you are all OK.

"Let me hear from you as quick as you can.

"Yours truly, W. A. MILLIKEN.

"P. S. Do not hesitate to let the Chicago people have the 10,000 acres—it will help any other trade we try to make in there.

"W. A. M."

Letter of Nov. 1, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"Waterman, Matthews and Company.

"WASHINGTON, D. C., *Nov. 1st*, 1902.

"MY DEAR MR. DOTSON: I was unable to see Mr. Spencer in N. York because he had left town for the West to be absent 10 days or 2 weeks. Mr. Waterman has called up Mr. Findly over the telephone and Findlay says the question of building into Harlan County was not mentioned by Mr. Spencer at the meeting on Wednesday—nothing has been decided about it. I saw Mr. Lineaweaver (the attorney from Pittsburg who introduced me to the Tri-State Coal & Coke Co.) in the town just now, and he tells me he had a talk with Mr. Easter some ten days ago on our deal and that it was purely a question of obtaining a letter from Spencer that the Railway would be built at Harlan. The dicker Easter is trying to make on price cuts no figure if Spencer will take up the question and write a letter saying he will build the road at once. This is the situation therefore as to that matter. I do not like Spencer's rushing off Wednesday night, as he knew you and I were in town to see him on this business. Findly told him we came up with him. The 70,000 acres is in the following situation.

"Doremus has a cash offer for the land from a Mr. Pierce Mining Engineer, representing a Pittsburg and Chicago crowd. The best I could obtain from him therefore was an option for 60 days on the terms of $350,000 in 60 days, and a deed in fee with general warranty for the land. For the purpose of facilitating matters I
67 wired you, on my return to Washington yesterday, which wire you answered from Bluefield, W. Va.

"Mess. Waterman and Matthews are exceedingly anxious to carry out the arrangement discussed between you and outlined in their letter to you the day we went to N. York. I have given them the terms Doremus requires to wit—350,000 in 30 days and 350,000 in 60 days. They wired you that they would make the 2d payment of 350,000 in 60 days if you would take care of the 1st payment in 30 days. They have shown me your answer by telegram. After further consultation with them I am now entirely satisfied they can carry out their part of the deal and I am going to hold off the Pittsburg people until your letter to Waterman arrives Monday. All I can do in Pittsburg is to get a profit of $50,000 by selling to them. They are willing to take the land at the price I have it from Doremus and pay me $50,000 and I step out of it entirely. Under the deal suggested by Waterman and Matthews the profit and advantages are so far more desirable that I am willing to take the chance of their carrying the deal through, provided of course you will join with them and carry one half the deal in place of ⅔ as at first proposed. This is what their wire to you intends. They are willing to assume the raising of one half the purchase price. They are working at it like Beavers, and Waterman assures me this morning they have secured an associate who alone with them can carry it through. By Monday morning he expects to have his half of the amount provided for.

"Yours truly, W. A. MILLIKEN."

Letter of Dec. 17, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"WASHINGTON, D. C., *Dec.* 17, 1902.

"N. B. Dotson, Esq., City.

"DEAR SIR: I have not received your letter in reply to the one I wrote you from the Earlington Hotel, New York City. From your conversation over the telephone yesterday, I am satisfied you have entirely misconstrued the purport of my last letter to you. I did not, in that letter, charge you with making any misrepresentations as to the building of the railroad. What I intended to say was that the entire negotiations for the sale of the lands in Harlan County, Ky., was based upon the statement by you both to me in person and by letter, that you had an arrangement with Mr. Spencer, President of the Southern Railway, by which he had agreed to build his road into your lands from Middlesboro. Mr. Spencer's conversation with me was to the effect that he had never made such an arrangement with you and that he did not know whether he would build said road or not; that he did not see anything at present to justify its building.

68 "Because of your inability to secure from Mr. Spencer some letter or written agreement to build this road, the negotiations for the sale of these lands to the Pittsburg people have been broken off and failed. I do not presume to pass upon the question whether you were right or Mr. Spencer, as it does not devolve upon me to do so; but I do say that as the negotiation was based entirely upon the assurances from you that you had an arrangement with Mr. Spencer to build this road, and these assurances I have in several letters from you, and as you have not been able to obtain from Mr. Spencer anything in writing to this effect, and as a consequence the sale has failed, I do feel that you should refund to me the amount of money that I have expended in carrying on said negotiations and should pay for the labor performed, and time given to these negotiations. This was what I intended to say in my former letter, and I think it bears no other construction.

"Whether you are right and Mr. Spencer wrong in saying he had never had any agreement with you, it is not my province or purpose to pass upon; but I am satisfied that it is right that you should repay me for my expenses, labor and time.

"Very truly yours, W. A. MILLIKEN,
"Room 36 Corcoran Bldg."

Letter of Dec. 9, 1902, from Milliken to Dotson, offered in evidence by defendant, as follows:

"Hotel Earlington, New & Absolutely Fire-Proof, 27th St. West, Near Broadway, N. Y.

"DEC. 9TH, 1902.

"N. B. Dotson, Esqr., Washington.

"DEAR SIR: If you care to see the "Sea-Board Air Line", people as to building into Harlan Co. Ky. I can arrange an interview on the subject for Thursday next. They control the L & N you know and I

am inclined to think it would do more good to see them, than Smith. You can wire me tomorrow, Room 127, No. 66 Broadway, and I will arrange the interview. It would be well to have Deering & Clarke present, if possible. It is bitter cold here, but perfectly bright & clear.

"Yours truly, W. A. MILLIKEN."

Plaintiff states that he was in New York City from the 19th to the 24th of September, but was not present at the conference with Finley on the 23rd; that he wrote the letter addressed to Finley, which is without date, but was written on Sept. 22, at the request of
69 Perin and Dotson; that he never had any conferences with Spencer or Finley about the railroad during the negotiations; spoke to Spencer about it after the deal had fallen through; that he cannot give the exact date when the deal fell through; that Spencer cabled to do nothing until his return from home; it was after that; that he cannot state the date in September or October when the deal failed.

Letter of July 8, 1902, from Dotson to Milliken offered in evidence by defendant, as follows:

"JULY 8TH, 1902.

"Judge W. A. Milliken, Pittsburg, Pa.

"DEAR SIR: I herewith enclose you a letter that you can show your people and will probably satisfy them as to price. If I remember aright $20. per acre is the price you named to them—while the price we named you is $17.50 an acre net. I mention the price of $20. an acre in the letter I enclose that you may show it to your parties. If they get this land they will have to act promptly or it will soon be sold to someone else. Mr. Dean and Mr. Hamilton opened the Widow Creech seam and cleaned it up and found six inches more of coal, so this opening shows 6 ft. and 7 inches of coal.

"Let me hear from you soon.

"Yours truly, N. B. DOTSON."

Plaintiff states that a letter from Easter to himself will enable him to fix the date when the deal dropped, and identifies the letter of Dec. 10, 1902, as the one referred to, which is offered in evidence by the plaintiff, as follows:

"Tri-State Coal and Coke Company.

"DECEMBER 10TH, 1902.

"Mr. W. A. Milliken, Washington, D. C.

"DEAR SIR: Replying to yours of the 5th will say that the reason we cannot go further with you in regard to the Harlan County, Kentucky, coal lands, is that the supposed railroad planned by Mr. Dotson to be built from Middlesboro to Harlan Court House had no foundation in fact.

70 "Upon the representation of Mr. Dotson we spent $500 in transportation, engineers and other expert services without saying anything about the time devoted by the writer to this matter.

"We went into this matter with you and Mr. Dotson upon the agreement that if your claims were not made good, all expenses would be refunded to us. We will be pleased to have you present this matter to your principals, and will await to hear what action you may take in the matter. We enclose herewith letter from Mr. Dotson to you in which he claims the railroad has been provided for.

"Yours very truly,

"THE TRI-STATE COAL & COKE COMPANY,

"By T. J. EASTER."

Plaintiff states that he first met Findley on Aug. 4, 1903, at Spencer's office on a different matter from this.

And thereupon plaintiff rested.

NAPOLEON B. DOTSON, the defendant, was produced as a witness in his own behalf and testified that in the beginning of the negotiation with the plaintiff to find a purchaser for the land he received a letter from Franklin Waterman in consequence of which he sent the plaintiff a prospectus of the property accompanied by a letter, and wrote him and made him a price of $17.50 per acre on the land; refers to letter of Apr. 24th; met Milliken at Waterman's office in Apr., 1902; Milliken had the prospectus and letters defendant had written him in reference to the property; that defendant and Milliken discussed the coal land, the situation as to railroads, the price, terms, and just what defendant wanted to do with the property in the way of finding a purchaser; defendant told Milliken he wanted $17.50 an acre net for the property, and he could have anything over that the land could be sold for, if it was through him; on Apr. 24, 1902, at the request of Waterman defendant wrote Milliken, as follows:

"I am just in receipt of a letter from Mr. Franklin Water-
71 man of your city requesting me to send you a description of our coal lands, which I herewith enclose, together with circular letters which will explain to you what we want to do with the property. I have arranged with the two R. R. to build a branch into it and develop the land. We want to find a good responsible party who will take or purchase one-half interest in the property at the rate of $17.50 per acre for the property and develop it jointly with us. Developed properties adjoining this of the same character are worth $300. per acre—other adjoining properties with coal and coke plants on it could not be purchased at even greater figures than this. We believe we have one of the finest coke and steam coal properties in the south. If you are interested we would be glad to see you at an early date, as we have arranged for a meeting with the railroad officials the latter part of May in New York, and want to complete our arrangement for the taking over and the development of the property before that time, as we would want our associates—or interested with us in this property, to be present at our meeting with the R. R. people, with a view of closing a contract with them for building branch roads into the property. I will be at the Waldorf Astoria Hotel N. Y. Sunday evening and Monday."

That there is a letter of July 8, 1902, from Milliken to defendant in which Milliken states he understands the price at $17.50; those two letters fix the price at $17.50 per acre; that was the arrangement defendant made with Milliken about the sale of the land; Milliken told defendant he thought he could sell the land to Pittsburg parties; the defendant met Milliken twice soon after that in New York or West Virginia during the summer of 1902; in the meantime defendant had some correspondence with the Southern Railway people that he took to Wise, West Virginia, and showed to Milliken; then we went over to Harlan County and made an investigation of the land; nobody else with Milliken and defendant on the first trip; met Milliken next time in New York at a conference in which we saw Perin and some of the Harvester Company officers, and prepared letters to submit to Findley as to what we would agree to do towards developing the property to induce the railroad to build into it;
72 the letters were handed to Perin; only had one conference, the one Finley spoke about; defendant saw Perin, Milliken and he believes James Deering of the Harvester Co. at the conference; defendant wrote one of the letters which was addressed either to Finley or Spencer; Milliken wrote a letter which was addressed either to Finley or Spencer; Milliken was supposed to represent the Tri-State Coal and Coke Co.; Perin wrote a letter addressed to the International Harvester Co.; the letters referred to the development of the coal lands in Harlan County to induce the Southern Railroad to build into the fields; Milliken, Perin and defendant got together and discussed the best plan to approach the railroad people to offer them inducements to get them to build a railroad into the property; it was thought best for each to write a letter for the people each represented and state to the railroad people just what each would be willing to do in the way of development if they would build a road into the property; the letters were delivered to Perin to be delivered to Finley; those are the letters introduced in evidence here.

Letter of May 13, 1902, from Spencer to Dotson, offered in evidence by defendant, as follows:

"Southern Railway Company.

"Office of the President.

"80 Broadway.

"NEW YORK, *May 13th*, 1902.

"Mr. N. B. Dotson, Wise, Virginia.

"DEAR SIR: I have yours of the 12th and note the favorable results of the tests of coal shipped to the Solvey Process Company.

"In respect to a letter to be shown to the parties you refer to, I don't see how I can at the moment write you a letter that would be of particular service to you, in the absence of more definite and explicit information and obligation as to improvement to be made upon your property.

"I can only repeat what passed at our interview, viz., that if
73 the property in question, and of the amount named by you, shall be put into such shape as to insure developments on a

scale which would warrant the construction of a railroad thereto we shall be pleased to take up with you and to consider favorably a plan for the construction of such a line.

"Of course, final conclusions must necessarily rest upon the conditions as then developed.

"Yours very truly, S. SPENCER, *President.*"

Defendant states that he received a telegram from Milliken asking him to come to Pittsburg to close a deal of the sale of property to those parties; that he went to Pittsburg pursuant to the telegram; that he showed a map of the location of the lands to Easter; Easter, Milliken, Wilson and defendant were present; that defendant explained to them the terms upon which the railroad would agree to build into the property; Easter suggested that defendant had better get a letter from Spencer—something in writing to bind him to construct the road; that they did not think they would go into the matter upon a simple statement from Spencer that they would build the road, and that defendant would have to get a letter from Spencer; defendant told Easter he was the proper party to do that; that they would have to make some inducements to the railroad before they would give such assurance; that defendant thought if Easter would see Spencer and let him know just what he was willing to do in the way of development of the property, Spencer would not object to giving him a letter of that kind; that they promised to do that and said they would arrange with Spencer to have a conference to see what arrangements could be made; that at the same time defendant gave Milliken a letter of introduction to Spencer, of date Sep. 5, 1902, written at the Hotel Henry; defendant gave the letter
74 to Milliken to take to Spencer to see what arrangements he could make about the matter.

Letter of Sep. 5, 1902, from Dotson to Spencer, offered in evidence by defendant, as follows:

"SEPTEMBER 5TH, 1902.

"Mr. Samuel Spencer, Pres. Southern Railway, 80 Broadway, N. Y.

"DEAR SIR: Judge W. A. Milliken, who will hand you this letter, calls on you in the interest of Pittsburg Coal people who want to join us in the development of some of our Harlan County, Kentucky, coal lands, if they know that a railroad will be built into them in the near future, any information you may see proper to give Judge Milliken relative to the building of the proposed R. R. into Harlan Co. will be highly appreciated.

"Yours truly, N. B. DOTSON."

Defendant states that he had some of the correspondence with Spencer at the conference at the Hotel Henry; he had the letter of Sep. 5 there; defendant had that letter and the maps of the property and prospectus and a bunch of papers consisting of correspondence with the railroad company at that conference, and he thinks Easter as well as Milliken saw these letters at that time; Milliken and defendant went over all the papers in the former's room before Easter

and Wilson came around to have them in shape to present to them—to meet Easter; that matters were discussed with them as to what arrangement defendant had with the railroad company and as to whether he had a written agreement, and defendant explained to them that he had not, and further explained the correspondence he had had with Spencer and what he had agreed to do at different conferences; then Easter said they could not go into the deal until they got a written contract from Spencer that he would build a road into the property; defendant states that he received a letter from Milliken dater July 7 (which has been put in evidence by
75 plaintiff) and in response to said letter wrote Milliken a letter dated July 8 naming the price at $17.50 per acre and enclosed it with another letter; that this letter referred to the other letter enclosed with it that he could show to the other party; it was the kind of letter Milliken wanted and defendant prepared it and gave Milliken the letter of explanation giving the reason why the price was mentioned as $20 per acre; Milliken wanted the letter to show to his people; Milliken called on defendant at his home in West Virginia and said that Easter had concluded to purchase 10,000 acres of land, but he required an option before he would go any further with the negotiations; Milliken had prepared an option prior to that and had requested defendant to grant Easter an option for sixty days in which to examine into and investigate and pay for the property, and at Milliken's request defendant granted the option; that he thinks Milliken brought the options prepared when he came; Milliken brought the option there; Milliken proposed the option conditional upon building the railroad and he changed it and made a straight option for the purchase of the land; that is defendant's recollection; defendant delivered the option to Milliken; defendant understood afterwards that Easter had the option; that an investigation of the property was made after the option was granted by Wilson; two investigations of the property were made; the first investigation was made for the purpose of ascertaining the coal, its quality, thickness and extent, and railroad facilities; defendant supposes the investigation was made in the interest of Easter, who held the option; defendant offered to sell 124,000 acres of land and some investigations were made while the negotiations were
76 going on; the Pittsburg parties whom Milliken had interested in the property were Lineaweaver, Tri-State Coal & Coke Co., Easter, Judge Potter, and somebody else; the capital of the organization, according to Milliken, was $2,500,000; they were to purchase 55 per cent. interest in the corporation, and defendant was to get 45 per cent.

Defendant states that he received letters from Spencer after May 13th; does not remember whether he saw Spencer after May 13th; his letters will show.

Letter of May 22, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"Southern Railway Company,

"Office of the President,

"80 Broadway.

"NEW YORK, *May 22nd,* 1902.

"Mr. N. B. Dotson, Wise, Virginia.

"DEAR SIR: I have yours of the 20th from Detroit, in respect to coal rates to that point from your Kentucky property.

"As advised at our recent conference, it will be necessary for you to take up with Mr. Findley all questions in connection with freight rates, and I suggest that you communicate with him direct at Washington, D. C.

"Yours very truly, S. SPENCER, *President.*"

Letter of June 3, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NEW YORK, *June 3rd,* 1902.

"Mr. N. B. Dotson, President Va. Coke & Steam Coal Co., Wise, Virginia.

"DEAR SIR: Referring to your letter of May 27th, I will of course be glad to see Mr. F. R. Hazard, president of the Solvey Process Company, in case he is in New York and desires to discuss the subject with me.

"You will appreciate, however, that the development of the property with the view of making shipments to Detroit would be of comparatively little value to this company, as we would get little or no benefit from the haul.

"Very truly yours, S. SPENCER, *President.*"

76½ Letter of Nov. 2, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NOVEMBER, 2, 1902.

"Mr. N. B. Dotson, Wise, Virginia.

"DEAR SIR: Yours of the 29th Ultimo reaches me on the line of road. I expect to be in New York again about the 12th to the 15th, and then shall be absent probably for ten days thereafter.

"I would be pleased to see you at any time in New York that I am there, and discuss more at length the question to which you refer.

"Yours very truly, S. SPENCER."

Letter of Dec. 20, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NEW YORK, *December 20th,* 1902.

"Mr. N. B. Dotson, 916 15th Street, N. W., Washington, D. C.

"DEAR SIR: Your letter of the 16th.

"I expect to be in Washington for several days immediately after the 1st of January, and I wish you would drop in at my office, No. 1300 Pennsylvania avenue, to see me at that time.

"Yours truly, S. SPENCER, *President.*"

Letter of Mar. 19, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NEW YORK, *March 19th*, 1902.

"Mr. N. B. Dotson, Holland House, City.

"DEAR SIR: Referring to your letter of March 15th.

"If you are down town during your stay in the city, and will call at this office, I will be glad to see you, although I have not at the moment anything definite in mind in connection with the subject referred to.

"In case I should happen to be out, ask to see Mr. Maslin.

"Yours very truly, S. SPENCER, *President.*"

Letter of Mar. 29, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

77 "Southern Railway Company,

"Office of the President,

"80 Broadway.

"NEW YORK, *March 29th*, 1902.

"Mr. N. B. Dotson, Wise, Virginia.

"DEAR SIR: Your favor of the 26th instant received.

"I had not written you after my telegram, as I had hoped to see you.

"I note the draft of letter which you have proposed to send to President Smith of the L. & N. and have taken the liberty of making some pencil suggestions thereon.

"Such a letter, so amended will not interfere with what I had to say to you, and our interview can be postponed until you have received Mr. Smith's response.

"I return herewith the draft of letter with the pencil notations referred to.

"Yours very truly, S. SPENCER, *President.*"

Letter of Apr. 4 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NEW YORK, *April 4th*, 1902.

Mr. N. B. Dotson, "President Virginia Coke and Steam Coal Company, Wise, Virginia.

"DEAR SIR: Your letter of the 31st ultimo.

"If you think it best I will be pleased to see Mr. Willits with you, but I leave the matter to your good judgment.

"Yours very truly, S. SPENCER, *President.*"

Letter of Apr. 21, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NEW YORK, N. Y., *April* 21, 1902.

"Mr. N. B. Dotson, Virginia Coke and Steam Coal Company, Wise, Va.

"DEAR SIR: Your letter of the 14th.

"If it suits you, I would prefer to see you before you see Mr. Smith.

"I shall be absent until about May 2nd, but expect to be in New York after that date.

"Yours very truly, S. SPENCER, *President.*"

78 Letter of Mar. 23, 1902, from Spencer to Dotson, offered in evidence by plaintiff, as follows:

"NEW YORK, *March* 23*rd*, 1903.

"Mr. N. B. Dotson, 916 15th Street, N. W., Washington, D. C.

"DEAR SIR: I have your letter of the 21st instant, in respect to the proposed trip over the Harlan County section.

"Please keep in communication with Mr. Fonde and arrange the matter to suit yourselves.

"Yours very truly, S. SPENCER, *President.*"

Defendant says he replied to Spencer's letter of May 13, 1902, in which the following language is used, to wit:

"I do not see how I can at the moment write a letter that would be of particular service to you, in the absence of more definite and explicit information and obligations as to improvements to be made upon your property."

Letter of May 16, 1902, from Dotson to Spencer, offered in evidence by plaintiff, as follows:

"Mr. S. Spencer, President, Southern R'y, 80 Broadway, N. Y.

"DEAR SIR: I have your favor of the 13th instant. Some of the people who are to be interested in the development of the coal property are to be here today, and I will see them this evening. I am also to see the Solvey Process people Monday, next, in Detroit. We expect to conclude our arrangements at an early date and will then be ready for development of the property as soon as we can get a R. R. into it—will keep you posted as the deal progresses.

"I have just received letters from some of our people in Harlan stating parties were there taking right of way for So. R'y Road into us immediately after we have our plan completed for development of the territory.

"Yours truly, N. B. DOTSON."

Defendant says he saw Spencer last time before May 13th about May 8th; that he stated to Spencer that he had negotiations
79 with several parties in Pittsburg, the Solvey Process people, the Harvester people, and Lineaweaver and Easter, through Milliken, and said to him that we were negotiating with these people

for the sale of 124,000 acres of land with a view of development on an extensive scale; the matter was discussed with Spencer as to the guarantee for the railroad to go into the property, and defendant said to Spencer that his information was that these were practical coal men, amply able to develop the property if they bought it, and that they were arranging for a company of $2,500,000 for the purchase of the land; that was the company defendant and Milliken had been talking about; explained the negotiations with the different parties and asked Spencer if he did not think that it would justify the building of a railroad into the property; that the people would buy the land and organize a company and develop the property; and asked if he was not satisfied without requiring a fixed number of coke ovens and fixed number of coal mines; Spencer said he would go ahead and locate the line into the lands on condition that they purchased the 120,000 acres; the letter of May 13th is in line with the statement; when defendant received the letter of May 13th he supposed Spencer had changed his position or mind from what he had made it up at the time of the conference; defendant says that in his letter of May 12th he refers to the conference.

Letter of May 12, 1902, from Dotson to Spencer offered in evidence by plaintiff, as follows:

"MAY 12, 1902.

"Mr. S. Spencer, Prest., Southern R'y Co., 80 Broadway, New York.

"DEAR SIR: Upon my arrival home from the East, I find a 80 letter from the Solvey Process Co., giving results of their test of the car of coal shipped them, with which they are highly pleased, and have asked me to obtain as soon as possible what rate can be secured to Detroit from the property. If you can give me a letter of some kind that would be of assistance to us, that you will allow me to show these people upon their arrival here which will be in a few days, I think we would then be able to conclude final arrangements for the development of the property on very large scale—we then could soon get matters arranged for you to go to work on the R. R. to the property as soon as you desire. We, of course, will want to see you, as soon as we get our arrangements completed and discuss fully with you the matter of building a road to the property on the lines heretofore suggested by you. Other parties who are to take an interest in the purchase and development of the property are standing ready as soon as the Solvey people get around, and we do not anticipate any further delay in bringing the matter to an early conclusion.

"Please let me hear from you soon.

"Yours truly, —— ——."

Defendant refers to Pittsburg people, the Tri-State people, as the people who were standing ready as soon as the Solvey Process people got round; defendant referred to general negotiations there; he has no letters from the Tri-State people to the effect that they were waiting on the Solvey people; he referred to general negotiations in the letter with the Solvey people, Harvester people, and the Pittsburg people; it was all discussed at the meeting with Spencer; that the

statement made by defendant to Milliken at Waterman's office was that he would sell the lands at $17.50 per acre net, and that that is stated in defendant's letter prior to meeting Milliken at Waterman's office; defendant did not tell Milliken at Waterman's office that the price was $20 per acre and that he would give him $2.50 per acre for every acre he sold; defendant admits his signature to the affidavit in the case; he explains that he wanted to explain to his counsel just what the negotiations were with Milliken and they said it did
81 not make any difference; that they had the affidavit already prepared and it amounted to the same thing; he swore to the affidavit supposing it to be the same thing—that Milliken had fixed the price at $20; that it is not true that defendant represented to Milliken or to anybody else that there was an agreement to construct a branch railroad into the lands without any consideration; that one of the considerations was the purchase and development of the lands; defendant had obtained from the Southern Railway Company an agreement or understanding or way by which they would build the road if the lands were purchased and developed on a scale that they said they would be; defendant got that from Spencer in different conferences and his letters refer to the same thing; he cannot specify any letter but refers to the general correspondence; defendant picks out letter of Mar. 26, 1902, from defendant to Spencer, which is offered in evidence by plaintiff, as follows:

"MAR. 26TH, 1902.

"S. Spencer, Esq., 80 Broadway, New York, N. Y.

"DEAR SIR: I am just in receipt of your telegram of the 24th, which I have answered as follows: "will say nothing to Mr. Smith until I see you again. Can't fix date when I will go East. See letter."

"I have just had a letter prepared for Mr. Smith, outlining a proposition to him, in accordance with your suggestions made to me in New York. I will withhold the letter until I hear from you or until I see you again, as we do not want to do anything in the premises that you would not approve, and I feel that we should be able to make arrangements with you for the development of the coal territory in question, by which you would be greatly benefited as well as our people. We believe we have one of the very finest coal territories in the South, and we believe a connection with your road is just what we want. I presume you have written me a letter that will better explain the situation, or your further desires in the
82 premises than the telegram received. If you have not already done so, you need not have any hesitancy in writing me fully, which will be treated confidentially. By your permission, however, I would like to submit anything you may have to say to parties who are becoming largely interested in the development of the property with us. If satisfactory arrangements can be made however, we would be glad to have connection with the L. & N. as well as your road. Any suggestion you may make however * * * to be as fine steam and gas coal as the Supt. claims it is very valuable.

"I hope to have coke from the other four samples in by Friday and will let you know results promptly.

"Judge Milliken's friends are figuring on taking an interest in the purchase of about 100,000 acres in the territory jointly with us. They will probably call on you or communicate with you in the near future, with reference to the matter. If the coal proves to be as fine steam and gas coal as Judge Milliken's people think, would it give us much greater market for it and render it more valuable to the operators as well as to the R. R.'s developing the field?

"Yours truly, —— ——."

Letter of Mar. 29, 1902, from Spencer to Dotson offered in evidence by plaintiff in connection with defendant's examination as to Spencer's promise to build a road, as follows:

"Southern Railway Company

"Office of the President

"80 Broadway,

"NEW YORK, *March* 29, 1902.

"Mr. N. B. Dotson, Wise, Va.

"DEAR SIR: Your favor of the 26th instant received.

"I have not written you after my telegram, as I had hoped to see you.

"I note the draft of letter which you had proposed to send to President Smith of the L. & N., and have taken the liberty of making some pencil suggestions thereon.

"Such a letter, so amended will not interfere with what I had to say to you, and our interview can be postponed until you have received Mr. Smith's response.

"I return herewith the draft of letter, with the pencil notations referred to.

"Yours very truly, S. SPENCER, *President.*"

The defendant then read the following letter at the in-
83 stance of plaintiff's counsel:

"Virginia Coke & Steam Coal Co.,

"(Incorporated)

"Paid up Capital $100,000.00

"N. B. Dotson, President,

"Wise, Va.

"MAR. 26TH, 1902.

"Mr. M. H. Smith, Prest. L. & N. R. R., Louisville, Ky.

"DEAR SIR: Your favor of the 18th instant addressed to me in care of Holland House, New York was promptly received there. We have about completed arrangements, for the purchase and development of about 124,000 acres of coal lands between the Va. State line and the Cumberland river, in Harlan and Letcher Counties, Ky., which we believe includes most of all the best coal lands of that

territory. We want a direct connection with both your line and the Southern so as to reach the largest territory of markets for our coal and coke, that could be advantageously reached over both. The coke and a good portion of the coal produced there would likely go out over your line and by a connection with the Southern, would furnish us a market for a great deal of coal that would not interfere with the markets reached by your road; hence we thought perhaps that the L. & N. and Southern R'y, would build jointly a branch into the property from Middlesboro, Ky., which would give us the desired outlet in both directions, and I have been requested to submit a proposition of this kind to you for your consideration, and will be glad to hear from you as soon as convenient that I may submit your reply to our Eastern associates at an early date.

"Yours truly, —— ——."

That the above letter was submitted to Smith at Spencer's request, and went to New York and conferred with Spencer who said they had concluded to do the thing themselves, and he went no further with Smith; Spencer said it was not necessary to go further with Smith, that they had concluded to do this thing themselves; the negotiations are explained in the letter just read; Smith said he would be glad to see us at Louisville.

Letter of April 14, 1902, from Smith to Dotson, offered in evidence by plaintiff, as follows:

"Louisville & Nashville Railroad Company,

"President's Office, Louisville, Ky.

84 "Milton H. Smith, President.

"APRIL 14, 1902.

"N. B. Dotson, Esq., Wise, Vir.

"DEAR SIR: Yours without date, received.

"I shall be glad to see the parties here at any time that may be mutually convenient, but I am absent a large part of the time, and it will be best for them to not come here without first making an appointment by wire.

"Yours truly, M. H. SMITH, *President.*"

Defendant finds another letter from Smith to himself, dated Apr. 3, 1902, which is offered in evidence by plaintiff, as follows:

"Louisville & Nashville Railroad Company.

"President's Office, Louisville, Ky.

"Milton H. Smith, President.

"APRIL 3, 1902.

"N. B. Dotson, Esq., Wise, Vir.

"DEAR SIR: Your favor of the 2nd inst. received.

"Your proposition is much too general, and no specific answer can be made.

"I am not prepared to make suggestions, except that when you are fully organized and know specifically what is wanted, an interview be arranged between yourself and associates and myself.

"It is quite probable that I shall visit New York within the next two weeks.

"Yours truly, M. H. SMITH, *President.*"

Defendant finds another letter from Vandenburg to himself of date Sep. 22, 1902, which is offered in evidence by the plaintiff, as follows:

"LOUISVILLE, KY., *Sept.* 22, *1897.*

"Mr. N. B. Dotson, Wise, C. H., Va.

"DEAR SIR: I have your letter of Sept. 20th, and am glad to note prospects of further developments in our Eastern Kentucky Districts. We are, of course, much interested in these developments, and will be glad to give you any information possible to assist in the matter. If you desire I can have one of our traveling men visit you for
85 the purpose, taking up any questions on which you may desire information.

"Yours truly, Y. VANDENBURG,
"Traffic Manager."

Defendant has letters from Smith of later date; he saw Smith later; he recognizes the prospectus he handed to Milliken in April, 1902; the defendant then has read over to him by counsel for the plaintiff extracts from the prospectus as follows:

"The L. & N. Southern railways, have both offered to build roads into this property?"

"The L. & N. and Southern railways have both offered to build roads into this property?

"There are now three railroads within ten miles of this property,—the L. & N., the Southern, and the Virginia and Southwestern roads,—and the junction of the L. & N., and the N. & W. road is within 15 miles of the property on the east. The valley of the Cumberland river affords an easy and low grade for a railroad to connect with either of the above lines, which can be easily and cheaply constructed, the work being very light. To build through the Cumberland valley a line fifty miles in length, would pass through the center of the property, and form connections with the Southern and L. & N. on the west, and the Virginia & Southwestern, and also the proposed line of the Seaboard Air Line, on the east, connecting with the Southern, thus affording this property unsurpassed railroad facilities for shipping coal and coke to the Great Lakes and the Northwest, and to the seaboard at Norfolk, Wilmington, and Charleston, for export or steam trade, with competing railroad systems to haul the coal and coke to both the Northwest and the Great Lakes, and the Atlantic Coast.

The above roads would be glad to extend branches into this property, upon the assurance that the property would be developed on large scale; but it would be far better for the owners of the property to construct and operate fifty miles of railroad, to be built and con-

nect with the several roads above referred to. The L. & N. and Southern could be reached by a short line of ten miles from t[illegible] property, and from ten to fifteen miles would reach the N. & W. Railway and proposed line of the Seaboard Air Line or C. & O., the L. & N. line having been surveyed through this Cumberland Valley, and also other roads not above referred to which we deem not necessary to mention, as the above are all that could be desired in the way of railroad transportation."

"The L. & N. and Southern have both offered to build roads into this property at once."

86 Defendant had negotiations with the L. & N. and Southern Railroads at different times; his attention is called to an extract from his letter of May 3 as follows:

"This is a property which will be developed by putting a railroad through there at once, which will enhance the value of it several times over."

and he explains by saying negotiations with the Southern road, and they had practically agreed to build the road and had engineers on the road locating the land; had several conferences with Spencer; telegram of May 8 from Milliken to himself read to witness, as follows:

"See Spencer and write me tonight how much development he will require before building road into property. Would 200 coke ovens be sufficient to start with? Your wire received too late last night to write you."

Witness sent a letter in response to it, dated May 8, 1902, which is read to the witness in part by plaintiff, as follows:

Mr. W. A. Milliken, c/o Hotel Henry, Pittsburg, Pennsylvania.

"DEAR SIR: I have your telegram here today. I have already discussed fully with Mr. Spencer the point with reference to extent of development he would like to have on the property to commence with, and am glad to say that Mr. Spencer is willing to build the road into the property without placing any requirements on the property holders to put in certain sized plants, or any number of coke ovens."

"Mr. Spencer has investigated the situation and knows the Southern and Louisville and Nashville Railroad can furnish a market for a vast amount of coal and coke from this field."

"I have explained fully to Mr. Spencer our plans for the development of the land, and now ready to commence work on the road just as soon as we are ready for him to do so."

Defendant says that Spencer may not have stated the above in so many words, but stated practically the same thing; he said that the

87 negotiations with the Pittsburg people for the purchase and development of 124,000 acres of land and the organization of a company with money to develop the property, that a transaction of that kind would be sufficiently satisfactory to him, and that he would build the road without requiring any specific number of ovens, as long as they would purchase the land; witness explained to Spencer the negotiations with all the parties; did not tell him the Tri-State people were going to buy the whole tract; Milliken said the

Tri-State people were going to buy all the land; the original negotiation with Easter was for him to buy the 124,000 acres and develop it. Defendant controlled other lands by option; he had a 50,000 acre tract and had letters from Waterman about it; from the position Spencer took in his letter of May 13, witness thought developments would be required; the Tri-State people and the other people in Pittsburgh were going to buy it all; Milliken in his statement said that he was in with Lineaweaver, attorney for several trust companies, banks, and coal companies and that they were soliciting subscriptions to form a company of $2,500,000; defendant thought from the letter of May 13 that Spencer would require developments; Milliken had been fully advised of the conversation with Spencer and witness stated in his letter of June 12, that Spencer's plan had been fully fixed and it was not necessary for defendant to accompany them, as he understood that if they wanted a written agreement they would have to give Spencer assurance; they never asked defendant for a written agreement before the interview at Hotel Henry; they knew of all the negotiations with Spencer.

Letter of June 12, 1902, from Dotson to Milliken offered in evidence by plaintiff, as follows:

88 "Virginia Coke & Steam Coal Co.

(Incorporated)

Paid Up Capital of $100,000.00.

N. B. Dotson, President.

Wise, Va.

JUNE 12, 1902.

Judge W. A. Milliken, Pitts., Pa.

DEAR SIR: I have your favor of the 9th instant. I am glad the coal and coke are entirely satisfactory as I was sure it would be. The Engineers are now locating the line of the Southern into the property. It would not be necessary for me to accompany Mr. Easter to see Mr. Spencer, as Mr. Spencer's plans are already fixed, he would not hesitate to say to Mr. Easter that they will build the road into that section at once. I think I will be at home all of this week. If I should be away any telegram you may send will be promptly forwarded to me.

"There are a number of people now after coal lands in that section and I believe if your people want the property they will find it greatly to their interest to take prompt action in the matter."

Defendant says it was understood that the property would be purchased and developed before Spencer would begin to build; that was the fixed understanding that he was ready to begin at once; that his letter of July 8 had reference to the purchase and development of the property; that letter was inclosed in another one that Milliken requested witness to write.

Letter of July 8, 1902, from Dotson to Milliken offered in evidence by plaintiff, as follows:

"Virginia Coke & Steam Coal Co.

(Incorporated)

Paid Up Capital $100,000.00

N. B. Dotson, President.

Wise, Va.

JULY 8, 1902.

Judge W. A. Milliken, Pitts., Pa.

DEAR SIR: Your telegram of yesterday advising me Mr. Ingraham had offered our property in Pitts. at $15. per acre was received and answered. When we first placed the property on the market we did offer it at this price, but after we completed arrangements with the R. R. Company for the development of the property, we advanced price to $20. per acre, and in naming price now to any new parties we are even naming a much higher price than $20. If your
89 parties act promptly, however, without too much delay we will maintain the price named you of $20 per acre, but the R. R. is now located too near the property and work will soon be vigorously pushed and of course price will very soon be higher. As soon as R. R. is completed the property will be worth several hundred dollars per acre, and the price is very insignificant we are naming on the property as compared with its value."

Yours truly, N. B. DOTSON."

Defendant explains that when the letter of July 9, 1902, was written to Milliken he was in negotiation with the Deering Harvester people for about 40,000 acres of land in the same section; the letter is offered in evidence by the plaintiff as follows:

"Virginia Coke & Steam Coal Co.

(Incorporated)

Paid Up Capital $100,000.00

N. B. Dotson, President.

Wise, Va.

JULY 9, 1902.

Judge W. A. Milliken, Pitts., Pa.

DEAR SIR: I have your favor of the 7th instant. I wrote you yesterday stating that nothing less than $20. per acre would buy our Harlan county coal lands—and also wired you the same; and if your parties get advantage of this low price they will have to act promptly, as R. R. will soon be built and the price will advance greatly. How much do your people want? Do they want the entire tract or do they only want a part of it? If you will let me know the exact number of acres they want to purchase, if they find the coal satisfactory upon further investigation, I will place you in position to give them refusal of the property for sufficient time to look it over and say whether or not they want it. Please bear in mind, however, that I have arrangements completed for taking over the lands, and will

want to begin taking over deeds at an early date. We now have titles abstracted, surveys made, &c., and no long option will be given on the property. Appreciating the amount of work and expease you have been to in trying to handle the property, we will give your people time to look the property over and give us a definite answer as to whether or not they take it. They, however, must act promptly, as we have other arrangements completed in case they do not care to take advantage of the offer. I think it will pay you to see Mr. Greer at once, about whom I wrote you a day or so ago.

As business men I do not think they should pay any attention to statements made by other parties that they can buy the property at lower figures. I hope, however, my letters to you of yesterday
90 were sufficient to satisfy your people and that you will have no further trouble along this line.

I leave for the West to-day and will be gone until the first of next week. The coal openings will all be in good shape by the time I get back and you need not hesitate to bring your engineer on at once.

Yours truly, N. B. DOTSON."

Defendant says the surveys were about completed; they were going ahead with the work; Milliken saw the letter of May 13 at defendant's house at Wise, Va. in May; Spencer did not say the road would not be built; said he would consider it favorably; defendant only knows what Milliken said about the option; Milliken knew about the negotiations with the Chicago people and advised the sale to the Chicago people in his letter and verbally; produces the letter from Milliken to himself, dated September 26, 1902, which is offered in evidence by plaintiff, as follows:—

"GRAND HOTEL, *Sept.* 26, 1902.

N. B. Dotson, Esqr., Wise, Va.

DEAR SIR: I met Mr. Perin this a. m. and learn from his conversation, that the feeling of the Chicago people is very strong against you & that they are determined to have the 10,000 acres they selected out of your lands—even if they have to have a lawsuit with you to get it. I told him there would be no necessity for coercion, as you were more than willing for them to have it, and all they had to do was to tender the money, and you would make them the deed. Perin told me you had offered him & them 70,000 acres in Tenn., but while they would consider the purchase of it from the owner direct, they would not touch it if you had anything to do with it. I am astonished at the very strong feeling entertained against you by Perin, who I thought was your friend. I am exceedingly sorry the deal should have terminated that way. I am going to Pittsburg to-night & will see my friends there tomorrow and sound them on the purchase of the 70,000 acres. Let me hear from you as soon as you know definitely what you can do with Harper after your meeting with him at Big Stone Gap. I may be able to turn Alexander and his people on to the 70,000 acre tract. Will you try it at any rate. I feel great regret about the Tri-State Coal Co. for they will be terribly put out when they learn no road will be built to your land, at present. I had

Major Robertson write to "The Nat. Bank of Bristol" about you today so as to satisfy "Doremus" you are all OK.

Let me hear from you as quick as you can.

Yours truly, W. A. MILLIKEN."

91 "P. S.—Do not hesitate to let the Chicago people have the 10,000 acres—it will help any other trade we try to make in there. W. A. M."

That was after the railroad scheme had fallen through. While the negotiations were going on with Milliken and others, from May to the fall of 1902, the Southern Railroad Co. was engaged in locating their lines and taking rights of way toward the construction of the road from the Middlesboro to Harlan Court House.

CHARLES P. PERIN was produced as a witness for the defendant and testified that he knows the defendant and that he has met the plaintiff several times, having met him first as he recollects between September 15th and 20th, 1902; he was not engaged in the summer of 1902 in promoting the sale of coal lands in Virginia and Kentucky owned by Dotson, the defendant, but was engaged as consulting engineer for the International Harvester Company, who employed him to negotiate with Dotson for the purchase of 20,000 to 30,000 acres of land; in connection with that purchase came up the question of railroad transportation and witness was instructed by the Deering Harvester Company to facilitate in every way possible the sale of other lands in Harlan County, Kentucky, which would induce the railroad to build from their existing lines at Middlesboro up to the lands purchased by the Deering Harvester Company; Milliken personally stated to the witness that he represented the Tri-State Coal and Coke Company who were about to purchase certain coal lands from Dotson; that their purchase was dependent upon the construction of the railroad, and that he was disposed to have his people join hands with the Deering Harvester Company to get a basis of what tonnage could be produced to induce the railroad to build in there; witness had several conferences with Milliken
92 on the question of building a railroad and the conditions which the Southern Railroad had made or required; at a conference of witness with Milliken on September 20, 1902, we endeavored to find out what our respective corporations could guarantee to the Southern Railway in the way of daily tonnage; Milliken stated to witness on September 20th that his corporation would guarantee Finley 500 tons per day, and that that would begin the construction of 500 ovens, which would mean a larger tonnage upon their completion; witness' recollection is that Milliken and himself jointly, in the presence of Dotson, or subject to his scrutiny, prepared a letter as to what the Tri-State Coal and Coke Company as inducement to get the railroad put in there; that his recollection is the letter was handed to Mr. Lankford, Secretary of the Southern Railway to be forwarded to W. W. Finley; he does not remember as to whether there was more than one letter of the kind written at

or about that time; does not recollect that any other document was given to Finley; witness read from a carbon copy of a telegram, signed by himself, sent to E. A. S. Clark, Deering Harvester Company, Sept. 20, 1902, in which he recites that he had just seen Milliken and that they would guarantee Finley 500 tons per day; not the paper referred to in the question; the other memorandum referred to by witness shows what dates he went — Luzern in the Adirondacks to interview Finley; the date of conference with Deering and dates of conferences with Finley in New York; that was the only letter in which there was a joint examination, such as referred to, with the knowledge of Dotson, Milliken and witness; Mr. Darlington, counsel for plaintiff, here offered in evidence the memorandum to which he referred as follows:

93 *"Memoranda for N. B. Dotson."*

"The record book of the Mines Securities Corporation shows that I returned from the examination of the Harlan County coal lands, September 12. On September 19 I went to Luzern, in the Adirondacks, to interview Mr. Finley, Vice-President of the Southern Railway. As a result of that interview, when he was next in New York, he arranged to see Mr. Deering and Mr. Clark, and I think Judge Milliken. As to Judge Milliken's presence I can't say positively. I think, however, that we presented to Mr. Finley on the date of our meeting in New York, which would be about September 22 to 23, a memoranda of tonnage which could be guaranteed. The Mines Securities record also shows that on September 22 Judge Milliken called at my office, 15 Broad Street, with Mr. Dotson. It was at this meeting that we discussed a form of letter to be presented to the Southern Railroad."

That the form of letter referred to in the memorandum is the letter that was prepared and sent to the office to be presented to the Southern Railway; the letter guaranteed to the Southern Railway tonnage from ovens of the Deering Harvester Company amounting to about 600 tons per day, and a possible 100 tons per day; tonnage from the operations to be erected by the Tri-State Coal and Coke Company, 500 tons per day, and other tonnage to be derived from an operation to be built by Matthews, Eddy & Company; witness' recollection is that they assured Finley and Spencer in this letter that if they would build their line at once up to this property, a guarantee of this development and tonnage would be made.

Spencer was in Europe at the time of the interview; witness had interviewed Spencer and Finley on the subject of the railroad; he met Milliken in Spencer's office one day just coming out from a conference; Milliken asked me if we were prepared to make our guarantee, and was told by witness that the Deerings did not want to make a guarantee unless they had to; the Deerings preferred guaranteeing the amount of their investment, and if possible to avoid putting their name to a positive assurance of so much tonnage
94 per day; Milliken said they were prepared to make their guarantee; he stated that his people were restless over the

delay on the part of the railroad in deciding what they were going to do, and he feared the matter might fall through for want of positive assurance on the part of the railroad that they would build a line; all of this conversation may not have occurred at one time; Milliken and witness had several conferences; that Milliken never stated or intimated to witness from the time he first met him down to final close of these matters, either directly or indirectly, that Dotson had written him, or stated to him, that he had closed an arrangement with Spencer that he would build a branch road into the coal region from Middlesboro to Harlan Court House, or any condition whatever; witness and Milliken were both anxious for transportation facilities and frequently discussed the question, pro and con; months before the purchase of land in Harlan County by the Harvester people, which was in May, Spencer sent for witness and stated that if sufficient tonnage could be developed in that district he would build a railroad to it; witness was absent from America, and, upon his return to Harlan County in September, he was surprised to find that Spencer had taken no steps in the direction of the construction of a railroad, and immediately got into communication with him, but for some time was unable to get any expression from the principal officers of the Southern Railway owing to the absence of Spencer and the serious illness of Andrews and Finley; about this time witness made the acquaintance of Milliken, who told him of his trip and of his examination of the Harlan County lands; Milliken was
brought to the office of witness by Dotson and they discussed
95 the question of the conditions upon which Spencer would
build the road, the idea being to arrive at some point which would result in a positive, absolute assurance from the railroad that they would build at once; it was a common cause between Milliken, Dotson, witness, and everybody connected with the development of Harlan County; knows that a survey was made in the summer of 1902; saw a preliminary sketch of the line; he was over the line in May and there in Harlan County in September and all of the month of October, and every month since.

Connection with these coal lands first began December 6, 1901; was employed by the Deering Harvester Company; never employed by anyone else; never paid any money on account of Dotson; met Milliken first at the office of the Mines Securities Company in New York City, 16 Broad Street, sometime around September 18, or a little before that time; first interviewed Finley about the railroad matter in Washington in April or May 1902; interviewed Finley upon the subject at Luzern in the Adirondacks, which was after the interview with Milliken at the Mines Securities Company office, when Dotson was present; the next or second interview with Milliken was at the same office either on the same day or the next, the next morning or afternoon after the first meeting; next, or third interview with Milliken was at the same office, but cannot recall the exact date; he called several times; the third interview was within a few days of September 20; fixes that date because he wrote his principals on that date the result of his conference with Milliken; had had probably three interviews with Milliken within a day or two prior to Septem-

ber 20th; thinks he had two conferences with Milliken on the 19th and one on the 20th; he may be in error as to the 19th, but is positive as to the meeting on the 20th; Dotson introduced Milliken
96 at the first interview as representing the Tri-State Coal and Coke Company who then contemplated the purchase of Harlan County lands, provided railroad facilities were assured; Dotson did not introduce Milliken as representing himself in any way, but rather as the agent of the Pittsburg investors; that Milliken was the agent of the Pittsburg investors and not Dotson's agent; at the first interview witness was asked by Dotson and Milliken the latest status of negotiations with the railroad; Milliken then told of the results of his previous conferences in Washington with Finley or Spencer; Dotson first described Milliken's business; Milliken then described the assurances he had from the Southern Railway previously in regard to the extension, and third a general discussion of the form of a letter to be submitted to the railroad showing what developments would be made by the corporations, and tonnage, provided they would build the road; a form of letter was submitted to witness to which he was to add certain things, and submit it; the letter was prepared at the interview; Milliken wrote the first letter to which witness added the results of the negotiation; a letter prepared by Milliken was brought to witness and it was suggested by Dotson that witness was to give, in addition to Milliken's testimony, as much information as he thought necessary of expenditures, of what coal had been proven and what tonnage of coal they thought they had, and what timber was on the property to convince the road of the wisdom of the construction of the branch road; thinks he signed the letter and forwarded it, speaking for Milliken at the time; thinks Milliken did not sign, or we may have signed jointly, but he cannot be positive; Milliken may have written the letter and signed it, and Dotson may have handed it to witness to be forwarded, of this he cannot be positive; witness cannot be positive as to whether
97 the letter was joint or separate and distinct; that if Milliken handed him a letter to be forwarded to Spencer so that he might know the things that had been promised, it was probably forwarded, as this was intended to be some joint action so that our attack might have more force than several separate guarantees; that witness has no copy of the letters; Milliken's letter should be in the files of Finley or Culp, and witness' letter should be there; if it was intended that witness should forward the letters to the Southern Railway, he did it; recollects having had a letter signed by Milliken; witness did with it whatever Milliken directed him to do; would naturally have obeyed instructions. Probably he saw such a letter from Milliken as he had written it and he was the agent of the Tri-State Coal and Coke Company; witness is trying to give what occurred in the month of September, 1902, at 15 Broad Street, the day that Dotson and Milliken first called on him; his recollection is that the letter was sent, together with one from witness, to the Southern Railway from his office; remembers that Clark and Finley came down from the Adirondacks on or about September 22nd for the express purpose then; Clark, Finley and witness had an

interview, but he does not recollect whether he handed the letter to Lankford or transmitted it; it is not customary for the Secretary to be present at conferences; Lankford was not present; he does not recollect that he handed the letter personally to Finley on the 22nd; his impression is that Milliken was not present at the interview. Milliken came into his office afterwards, cannot tell exactly when, and he had been in the office of the Southern Railway; he saw Milliken a number of times, but never took the pains to
98 imprint upon his memory every detail of every interview; he saw Milliken three times; witness says his memory is very vague, except that he had an interview with Milliken on the 20th and communicated the results of it to his principals; on this point his memory is absolutely beyond peradventure; this is not the only thing he is definite about; he does not know anything about the whole suit or Milliken's object; witness thinks he has stated all so far that is sufficiently definite to be of interest in the suit; he could tell a good deal that is not so definite but probably counsel would not like to hear it, he has stated that Milliken came to his office with Dotson, but as to what happened he could not say within accurate limits, but the first meeting was certainly not prior to the 15th nor later than the 20th of September; the letter was written at the first meeting, prior to Sept. 20, or it may have been on that date; his recollection is not clear that the letter was a joint one, beyond the fact that it was to be a joint attack in order to give force to what was said; it was intended to be submitted at the same time—if the letters were separate they were intended to go in together to be ready for the meeting with Finley on the 22nd; Milliken's letter was probably addressed to W. W. Finley, or it may have been sent to Spencer; Finley told witness he cabled extracts from the letter to Spencer; witness saw a copy of the cable which purported to have been sent to Spencer; witness first saw Spencer in regard to a railroad into the coal lands in Harlan County, he thinks, in March, and had repeated interviews with him until witness departed from America in May; witness left the country, he thinks, on May 27th and returned in the Fall—he thinks in the early part of September; he
99 met Milliken coming out of Finley's office after the letter had been written—it must have been after the 22nd; they discussed at the meeting generally the question of guarantees and what the railroad really meant to do; Milliken asked witness if he was ready to make a guarantee, saying he was prepared to make his; the letter was in no sense a guarantee, it was a statement of what would be done if a guarantee was given to build the road; witness says the Southern Railway had in a breezy way promised to build a railroad if developments were put in there and on the strength of that statement the Deering Harvester Company bought lands and then when we were prepared to develop the lands Spencer said he was not prepared to build the road because financial conditions had changed; this was quite late in the Fall; expected Spencer to give a guarantee that he would build a road before they would spend money on the lands; a written statement from Spencer that he would build the road would have brought a guarantee from the other side as to

tonnage; witness told Milliken the Deering people did not wish to guarantee tonnage if they could help it; they offered at the time the letter was written to guarantee 600 tons daily, but the attitude of the Harvester Company changed as to the guarantee—they wished to avoid it as far as possible; witness has seen Milliken since Sept. 20, 1902; saw him once when he thought the deal between Dotson and the Harvester people was likely to fall through, and thinks he saw him alone after that in the month of October, before the 17th or after the 27th, alone at witness' office; cannot tell interval between the interviews of Sept., 1902, and the last one but says the interval between the 19th and the last day of the month would be eleven days; witness never saw Milliken more than once in his life.

And thereupon defendant rested.

100 Deposition of H. L. Ash tends to prove:

That he resided here about nine years. At Wise, Va., three or four or five years. That he was formerly proprietor of the Dotson Hotel at Wise, Va. That W. A. Milliken, plaintiff, stopped at the Dotson hotel. That Mr. Milliken in conversation relative to the building of a railroad into the coal fields in Harlan Co., Ky., said: The Company he was representing had money enough to open up business in Harlan Co., Ky. He had money enough behind it to carry through the enterprise. In conversation as to whether or not the Southern Railroad Company would build a railroad into the coal fields of Harlan Co., Ky., unless the coal lands were opened up and developed sufficiently to justify a company to build it, he said:

That the Company he represented had means to open up the mines. That the Company would come in if enough inducements were had with their road or some road.

That the people coming in there would have to develop the coal that would be inducement for the road to come in, was the substance of it.

That this conversation occur-ed the latter part of May, 1902. That on looking at the hotel register for May, witness stated that Mr. Milliken was registered, and was there on the 16th and 22nd of May, 1902.

That it was during these times that he was stopping at the hotel that he had these conversations.

On cross-examination: That he could not recall any one who was present. There were several.

The conversations occur-ed on the veranda of the hotel.

That there were two of these conversations.

101 The deposition of Charles Blair tends to prove:

That he resided in Harlan Co., Ky.

That he knew plaintiff; met him first in Harlan Co., Ky.

That he does not remember whether it was the 17th or 18th of May, 1902, but it was some time in May, 1902, that he first went with plaintiff over these coal lands in Harlan Co., Ky.

That he rode with plaintiff two or three trips to show him these coal lands.

That plaintiff and he generally rode together in front of the crowd that was with plaintiff.

That plaintiff talked to him about the coal and said that unless it went into the hands of capitalists, who were able to put in plants, coke the coal and guarantee shipments sufficient to pay a railroad that we would never have a railroad in our country but if the people would sell their lands and let companies that were able to put in plants and develop the coal and timber have it, we would have a road in that country at once, he thought.

That the Southern people were ready to build a road in here whenever his people took up the lands and got ready to develop the property. He referred to the Southern R. R. Co.

That plaintiff had different conversations with him on different trips and different times while going with plaintiff to show him these lands.

In one of these conversations plaintiff said that we never would have a road until the coal lands went into the hands of capitalists and men who were able to build plants and develop the lands.

To question, "If I understand you right, Mr. Milliken said
102 he thought the Southern R. R. Company would build its line of road into that section provided the Company he represented took up the lands," witness replied: Provided they take up the lands and guarantee shipments.

That witness did not remember whether plaintiff stated how much shipments would have to be guaranteed to induce the road to build into these lands, but plaintiff said it would take a sufficient quantity before we would ever have the road and that his people were able to put in plants that would justify any company to put in a road.

That they were ready and able to build and that the Southern would build a road. That this conversation occur-ed in May to August or September, I don't remember which.

I went with Mr. Milliken and some other people and it was while I was with him.

I remember on one particular occasion on Clover Fork, along in August and near the mouth of Yocum's Creek he spoke of wanting me to secure that part for him.

That they would have a good show there to put in a plant.

That it was at the time they were at Clover Fork, and that Mr. Easter and Mr. Humphrey were with them.

That he does not remember whether it was the 17th or 18th of May, 1902, he met Mr. Milliken in Harlan Co., Ky., but it was sometime in May; don't remember what time exactly. June or latter part of May would, I think, be near the time.

That plaintiff's conversation at all times seemed to be that the lands would have to go into the hands of corporations before a railroad would come.

That the rich coal ought to be developed.

103 That before it could be developed a railroad would have to come in. That this conversation was in June instead of May.

That if plants were put in, and developments made other companies would come in.

That he represented Pennsylvania people, Try Coal Company, Try State Coal Company; something like that.

That witness was and had been engaged beginning in March to procure contracts on land for Mr. Dotson or his Company.

That Mr. Milliken was encouraging witness to get up the lands.

That witness showed to plaintiff the coal and travelled with him to different banks and portions of the country.

That he is not positive whether it was two or three times he went with plaintiff to show him these lands, but is positive it was as many as two times.

That it took about two or three days to look over the field.

That the first time they went to Looney's Creek, Clover Fork, Clover Lake, and a great many different openings.

That he could not be positive whether this trip was in May or June.

That on his second trip with Mr. Milliken they went to Harlan Court House and spent the night at Blair's and Mr. Humphrey and Mr. Easter stayed down at Cornett's.

That witness's son went with Mr. Milliken the first trip he took,—that Mr. Milliken took.

At the time Mr. Humphrey and Mr. Easter were with him.

104 That Mr. Easter and Mr. Humphrey were with Mr. Milliken the third trip.

That no one was present at any of these conversations of Mr. Milliken about building the railroad except one time at Harlan. He talked it there on the porch, but witness could not say who was there.

That most of his conversation was when they were riding together.

That he and witness generally rode in front of the crowd.

That Mr. Milliken said nothing about where he got his information as to the building of the railroad.

He said they never would have a road into the country until our lands went into the hands of corporations who could guarantee shipments, and then the Southern people were ready to build a road.

He talked a great deal about it. Talked as though he knew all about the road himself.

That the railroad Company were ready to build the road in if they got the lands and could guarantee shipments.

That Mr. Dotson said that we would have a road if we had plants sufficient to induce it.

That the Southern or L. & N. would come in but there had to be a sufficiency of freight guaranteed before either would come in.

That he never heard Mr. Dotson say he had an agreement or contract with the Southern to build in there, but heard him say the railroad people would build a road he thought whenever there was a sufficiency of freight guaranteed. He seemed to think the Southern would be the most likely to build.

105 That Mr. Milliken never told witness he got his information about the Southern building a road from Mr. Dotson, but he talked as though he got it from the people direct.

That was my understanding that he had an understanding with the people himself.

Deposition of WM. C. BLAIR tends to prove:

That he is the son of Charles Blair; his age is thirty years, and he resides at Harlan Co., Ky.

That he met Mr. Milliken in Harlan Co., in May, 1902, and made a trip with him through the coal fields.

That he does not remember of Mr. Milliken saying anything about there not being a road built, but he talked as if it would be if the coal proved all right and his Company took hold of it or the capitalists developed it.

That he did not say that he got his information about building a road from Mr. Dotson.

He stated about this: That the Company he represented would put in a plant and induce a road to build in there if the coal coked all right, and they got the property.

Deposition of WESLEY HICKS tends to prove:

That Mr. Milliken said to him and Mr. Moore near Wise, Va., that if the people of Harlan Co., Ky., would sell their lands to a company that there would be a railroad built there.

That if they would sell to the Company so that they would have some assurance with reference to the railroad that it would be built.

That this conversation was from the 15th to the last of May.

106 That he did not say from whom he got his information about the building of a railroad nor did he say what railroad it was.

Deposition of DALE C. DEAN tends to prove:

That he is forty-four (44) years of age; lives at Wise, Va.

That he went with Mr. Milliken and a Dr. Mason, I think was his name, from Wise, Va., to Harlan County in the Spring of 1902.

That he met Will Blair at his father's, Charles Blair's.

They were there on the 21st of June, 1902; that he made a memorandum of it and had it present.

That he paid Mr. Blair $6 for showing up coal to Mr. Milliken.

That he was out with Mr. Milliken on that trip about five days.

That in August or September following, he went with Mr. Milliken and two others down to Clover Fork, where they met Mr. Charles Blair, who has just testified in this case.

He left Mr. Milliken and the other men with Mr. Blair and returned home.

Deposition of JOSEPH D. DOTSON tends to prove:

That he is 29 years old.

Knows plaintiff Milliken and saw him in Wise, Va., in the Summer of 1902.

That a letter bearing date of May 13, 1902, addressed to Mr. N. B. Dotson, Wise, Va., signed, S. Spencer, president, was shown

107 to witness by N. P. Dotson, soon after it was received in May.

That N. B. Dotson showed this letter to plaintiff Milliken

in Wise, Va., in the Summer of 1902, about July 20 or 22, 1902, in Mr. Dotson's office in Wise, Va.

That he knows the date from the date of a check he made to I. C. Cox for payment on purchase price of coal lands.

That Mr. Milliken was there several days perhaps a week at that time. That at the time Mr. Dotson showed to Mr. Milliken said letter, he also showed him a map or profile of the railroad.

That Mr. Milliken was registered at the Dotson hotel, Wise, Va., on May 16, 1902, on May 22, 1902, on June 29, 1902, on July 19, 1902, on July 26, 1902, on August 3, 1902, and on August 13, 1902.

That Mr. Dotson had other letters from Mr. S. Spencer, president. Does not remember dates but some were before and some were after the above named letter, and that he does not remember that the letter of May 13th in particular was shown to the plaintiff.

The deposition of JOHN M. BLAIR tends to prove:

That he is 37 years old; resides at Harlan Co., Ky., and is a travelling salesman.

That he knows plaintiff, W. A. Milliken. Met him the first time at his, witness's residence, in Harlan Co., Ky., in the month of June or July, 1902.

The next time he met him at Poor Fork, in Harlan Co., Ky., at W. W. Cornette's store in the month of August.

That witness was then getting up options for Mr. Dotson.

108 That at said first meeting Mr. Milliken said he represented people who were able to put in coal operations or coke plants, provided they could get enough lands in Harlan Co., Ky., to justify them to put in coke and coal plants or coke plants and guarantee a sufficient tonnage to induce the Southern railroad people to build a road.

That the Southern people would come in there at once.

That lands never would amount to anything as long as the citizens held them.

That it takes capitalists to get hold of coal fields to induce any railroad into a country.

That no railroad would build a line into a country on any uncertain basis.

That his people were amply able to put up any kind of an operation that would be necessary to induce the road to come.

That no railroad company would build a railroad in any country until there was a guarantee.

That it took a sufficient amount of tonnage to induce a railroad in.

That the Southern was the only road he talked about building into Harlan County.

That the next time witness met plaintiff in conversation with reference to the building of a railroad into Harlan County and what was necessary to be done to induce its building was substantially the same as at said first meeting.

That a road would be built if the lands were transferred to companies who were able to put in coal and coke operations.

109 That the first time Mr. Milliken was at Harlan Co., Ky., Easter and Humphrey were with him. The second time a man by the name of Hitchcock was with him.

These were the first and second times that witness saw plaintiff there.

That the transcript of the orders entered in the condemnation proceedings of Middlesboro Mineral Railway Company *vs.* Jno. J. Howard, same *vs.* Andrew Saylor, same *vs.* Jno. M. Saylor, same *vs.* F. R. Blanton *et al.*, same *vs.* J. A. Hopkins, same *vs.* John L. Jones and wife, same *vs.* Smith & Bramlett, same *vs.* Jacob Sams, same *vs.* Wm. Day *et al.*, same *vs.* Joe Noe, *et al.*, same *vs.* Mollie Noe, *et al.*, same *vs.* E. M. Howard and wife, same *vs.* J. H. Howard, was filed as part of witness's deposition marked Jno. M. Blair Exhibit No. 1.

That said Middlesboro Mineral Railway Company is a branch of the Southern Railroad Company.

That the Southern Railroad Company or Middlesboro Mineral Railway Co., acquired rights of way to Harlan Court House and into these lands.

That it is a branch or part of the Southern Railroad Company.

That Mr. Fonde, vice-president of the Southern Railroad Company told witness so, and that all that was lacking was sufficient guarantee of tonnage and he thought the road would be built.

That Mr. Dotson said that if the Southern did not build some other railroad company would.

That if we could get capitalists interested who would take hold of the matter and was able to guarantee a sufficient tonnage to
110 justify a road in coming, that he thought the Southern would build a road in there and that there was no question of the road, provided we could get capitalists to take hold of that field, who were able to operate mines and induce a road to come in there.

That he never heard Mr. Dotson say in substance that he had a contract with the Southern R. R. Co. to build a road in there, but heard him say that he was associated with some strong people who if he could get to take hold of the Harlan situation that they were amply able to put up coal operations of any kind of plants, and thought they would induce the Southern people in there.

For if the Southern did not build, he thought they would induce some other railroad people to come in there, and he was inclined to think that the Southern people would not let the opportunity pass.

That the right of way was acquired and was continuous and complete from Middlesboro to Harlan Court House.

That on the last trip he saw Mr. Milliken; he was with him about two days.

Mr. N. B. Dotson and Charles Blair were also with them.

That Mr. Dotson said he thought Mr. Milliken's people were good people and he hoped that we would be able to induce a road in there for us, providing we could make the deal with the citizens for the lands.

That Mr. Dotson never showed witness any agreement between him and the Southern people, nor did any one else, but that witness read a letter shown him which was from Spencer to Dotson and dated

New York, May 13, 1902, and he makes the same a part of his answer.

111 Said letter is as follows:

80 B'WAY, NEW YORK, *May* 13, 1902.

Mr. N. B. Dotson, Wise, Va.

DEAR SIR: I have yours of the 12th and note the favorable results of the test of coal shipped to the Solvey Process Co. In respect to a letter to be shown to the parties you refer to, I do not see how I can at the present moment write a letter that would be of particular service to you in the absence of more definite and explicit information and obligations as to improvements to be made upon your property. I can only repeat what passed at our interview, viz: That if the property in question, and of the amount named by you, shall be put into such shape as to insure developments on a scale which would warrant the construction of a railroad thereto we shall be pleased to take up with you and consider favorably a plan for the construction of such a line. Of course, final conclusion must necessarily rest upon the conditions as then developed.

Yours very truly,

(Signed) S. SPENCER, *President.*

That he, witness, never heard Mr. Dotson say that he had any agreement with the Southern people to build the road, but did hear him say at different times that if he could get the coal lands into the hands of capitalists who were able to operate it that some railroad would come in.

That it took capitalists to induce railroads into any country or coal fields.

Counsel for plaintiff then recalled WILLIAM A. MILLIKEN, the plaintiff, who testified in rebuttal, as follows:

That he never told Charles Blair and John Blair that a railroad could come in provided his (Milliken's) people guaranteed a

112 sufficient tonnage; that he did not encourage Charles Blair to get all the options he could for Dotson; that he went there with Dotson's representation that he already owned or controlled 124,000 acres; that he did not ask Charles Blair to get a location for him on Clover Fork; that he said nothing at all about buying land—he was not there to buy land; that he never said to John M. Blair that he could get the road provided he got enough land to develop; that the only quantity of land mentioned in his transaction, was 124,000 acres mentioned in the prospectus or first letter of Dotson; that the only times he met Perin in this connection was on the 22nd and 23rd days of September; that he never told Perin anything about conferences in Washington with Finley and Spencer—no such conferences occurred; first met Finley on Aug. 4, 1903; Spencer was in Europe when the negotiations were going on; that Dotson did not show him at Wise the letter of May 13th from Spencer stating that he would have to have obligations, or guarantees, before he would build the road in—Dotson is mistaken about that; that

Dotson did not exhibit this letter at the interview with Easter at Hotel Henry, on Sept. 4th, as he has stated; and that witness never heard of this letter prior to its production at this trial; that Dotson did not explain to Easter in witness's presence in the interview at Hotel Henry that Easter would have to give assurances of what he would do before Spencer would build the road; that Dotson assured Easter and Wilson that he could get a letter from Spencer that he would build the road, and did not mention any conditions at all; that he has known Spencer quite well a good many years—away back to 1890; that when Easter and his expert Humphreys and the witness returned from an examination of the coal lands in June, witness stopped off to see Dotson and to his surprise Dotson informed him that he was about to sell 30,000 acres of this land to some
113 people in Chicago; witness told Dotson he thought that broke up his entire work and in justice to the Pittsburg people he must notify them, and sat down on June 29th and wrote them a letter and received Easter's letter of July 2, 1902, in reply; he told Dotson what he was writing, and that upon the receipt of a reply to open it, read it, and forward it; witness went to Pittsburg and this letter was forwarded by Dotson; the letter calls for an option because Dotson had sold 30,000 acres of land they were looking over, and they contemplated taking the whole thing; witness did not carry any option down there; there was no other option except the one prepared there and signed by Dotson of which witness has any recollection; the letter mentioned is offered in evidence by plaintiff as follows:

Tri-State Coal & Coke Company,

Coal and Coke.

T. J. Easter, Prest.; Wm. Harris, Vice Prest.; C. W. Eisenbeis, Treas.

PITTSBURG, PA., *July 2nd*, 1902.

Mr. W. A. Milliken, Wise, Va.

DEAR SIR: We have yours of the 29th, and note the conditions as you found them upon your meeting with Mr. Dodson.

We are very much surprised to learn that we were asked to spend time and money to look over a field that had been sold. You probably are aware of the sacrifice the writer had to make during his absence of ten days, and that of Mr. Humphreys, who left important work for such a trip.

We are not disposed to spend any further time on this matter, unless we are given an option on the purchase of a tract of from 10,000 to 100,000 acres. The option to stipulate price and terms upon tracts of 10, 20, 30, and up to 100,000 acres. Term of option to extend through sufficient time to map out a tract of land after the engineer and miners of whom you speak, leaving Stonega in your interests on June 30th, have gone over and traced out the veins.

If you are willing to place us in possession of the option
114 and assurance that we will have something to deal for, after we have obtained reasonable data to base an investment upon, we have no objection to continuing the investigation.

Yours truly,

TRI-STATE COAL & COKE CO.,
By T. J. EASTER.

The option referred to is the one that has been put in evidence; it was given to Easter by Dotson on the 24th or 25th of July; it was signed at Dotson's house in Wise County, Virginia; that it is his recollection that he did not take the option down, but that it was prepared down there; witness accepted the option, or Dotson may have sent it to Easter; that witness may have mailed it to Mr. Easter, but that he can not tell whether he did; the 10,000 acres in the option were to be selected out of the land; this is the only option the witness knows anything about.

The testimony on both sides was thereupon announced closed.

The above and foregoing was all the evidence given in the case.

115 Counsel for plaintiff moves the Court to instruct the jury as follows:

If the jury believe from the evidence that the defendant, on or about the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan County Coal lands at the price of $20.00 per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20.00 per acre, and that shortly thereafter, namely, on or about the 8th day of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into the said property without placing any requirements on the purchasers or holders of the said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the defendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready and willing to purchase ten thousand acres of the said lands at the said price provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representations that the said Railway Company had so consented or agreed to construct a branch railroad into the said coal lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the said ten thousand acres, or $25,000, in all.

The court granted the motion of counsel for plaintiff and allowed the said instruction over the objection of counsel for Defend-
116 ant, to which ruling of the court counsel for defendant during the trial and before the jury rendered their verdict, duly excepted, and the said exception was then and there duly noted by the presiding justice on the minutes of the Court.

Defendant's Prayers.

Counsel for defendant moved the court to instruct the jury as follows:

1. If the jury believe from the evidence that an option was en-

tered into on the 24th day of July, 1902, between the defendant either in his own behalf or as the representative of the Virginia Coke and Steam Coal Company as its president, and Terrill J. Easter, either in his own behalf or as representative of the Tri-State Coal & Coke Company as its president, for the sale and purchase of the 10,000 acres of land mentioned in the declaration, and that said option was the result of the previous parol agreement, written communications, negotiations, conversations and representations between the plaintiff and the defendant in respect to the plaintiff finding a purchaser for said land, then you are instructed that such previous parol agreement, written communications, negotiations, conversations and representations are merged in the said option of July 24, 1902, and are not to be considered by you as evidence in this case for the reason that the said option expresses the final intention and understanding of the parties up to the date of its execution.

117 Trustees Oakland College *v.* Stafford, 14, Iowa, 152.
Monongahela Nav. Co. *v.* Fenlon, 4 Watts & Serg. 208-9.
Richardson *et al. v.* Comstock, 21 Ark. 69.
Hoxie *v.* Hodges, 1 Oregon, 251.
Brawley *v.* United States, 96 U. S., 168, 173-4.

Rejected.

The court overruled the motion of the defendant and rejected the said instruction No. 1, as prayed for; to which ruling of the court counsel for the defendant, during the trial and before the jury rendered their verdict, duly excepted, and the said exception was then and there duly noted by the presiding justice upon the minutes of the Court.

Counsel for defendant moved the court to instruct the jury as follows:

2. If the jury believe from the evidence that the plaintiff entered into the special agreement with the defendant as alleged in the declaration, by the terms of which his compensation or commission depended on the sale of the land at a stated price, or on procuring a purchaser at the owner's price and terms, and that said plaintiff did not, in accordance with the terms of his said special agreement, effect an actual sale of the land by a binding and enforcible agreement obtained by him for the sale and conveyance of said land to a purchaser who was ready to close and able to perform such agreement of purchase, then the plaintiff is not entitled to recover.

And if you believe from the evidence that the plaintiff has shown simply a provisional arrangement for the sale or purchase of said land by general negotiations or written option, which may have been accepted or rejected by the proposed purchaser at his pleasure

118 or privilege, and which sale or purchase was never consummated, then the plaintiff cannot recover.

Mannix *v.* Hildreth, 2 App. Cas. D. C., 259;
Condict *v.* Cowdry, 139 N. Y., 273; S. C. 123 *id.* 463.
Colwell *v.* Springfield Iron Co., 24 Fed. Rep. 631.
Schwartz *v.* Yearly, 31 Md. 270.

Rejected.

The court overruled the motion of the defendant and rejected instruction No. 2 as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted; and the said exception was then and there duly noted by the presiding justice upon the minutes of the court.

Counsel for defendant moved the court to instruct the jury as follows:

3. If the jury believe from the evidence that the alleged representations of the defendant that he had obtained the consent and agreement of the Southern Railway Company to construct a branch railroad into the lands located in Letcher and Harlan Counties, Kentucky, for which said defendant desired to secure a purchaser as alleged in the declaration, and that the said alleged representations presented facts and matters concerning the alleged agreement between the defendant and Southern Railway Company, and also as to the conditions on which the said Railroad Company would construct a branch railroad into said lands, the truth of which representations were open to and within reach of the plaintiff for inspection and investigation in like manner that they were open to the defendant, and equally available to both parties, and that the plaintiff did not avail himself of such means and opportunities at
119 hand and in his possession for the purpose of verifying such representations, then you should find for the defendant.

Farnsworth *v.* Duffrew, 142 U. S. 43.
Slaughter's Admr. *v.* Gerson, 13 Wall., 379.
Farrar *v.* Churchill, 135 U. S. 609.
Southern Development Co. *v.* Silva, 125 U. S. 247.

The court overruled the motion of the defendant and rejected instruction No. 3 as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted, and the said exception was then and there noted by the presiding justice upon the minutes of the court.

Counsel for defendant moved the court to instruct the jury as follows:

4. The burden of proof upon the issue of misrepresentation is on the plaintiff and he must bring evidence sufficient to overcome the natural presumption of fair dealing and honesty; that is, it must be established by the plaintiff by clear and decisive proof (1) that the defendant has made a representation in regard to a material fact; (2) that such representation is false; (3) that such representation was not actually believed by the defendant, on reasonable grounds, to be true; (4) that it was made with the intent that it should be acted on; (5) that it was acted on by the plaintiff to his damage; (6) that in so acting on it the plaintiff was ignorant of its falsity, and reasonably believed it to be true. But where the plaintiff undertakes to make investigations of his own as to such representations, and the defendant does nothing to prevent his investigation being as full as he chooses to make it, the plaintiff cannot afterwards claim and recover on the ground that the defendant made misrepresentations.

Southern Dev. Co. *v.* Silva, 125 U. S., 247.

Rejected.

120 The court overruled the motion of the defendant and rejected instruction No. 4 as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted, and the said exception was then and there noted, by the presiding justice upon the minutes of the Court.

Counsel for defendant moved the court to instruct the jury as follows:

5. If the jury believe from the evidence that any *bona fide* purchaser was actually found by the plaintiff for 10,000 acres of said land as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge or co-operation of said plaintiff and at his suggestion sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by interviews, conferences or written communications, either personally or by attorney, or by others, with the president and first vice-president of the Southern Railway Company for the purpose of verifying the said statements and representations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in

121 regard to the construction of said branch railroad, and ascertained from the said officers of the said Railway Company, from time to time during said negotiations and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and said Southern Railway Company to build said branch railroad, but that the subject of building such branch railroad had only been discussed, and that the building thereof depended on the development and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens, or furnishing the railroad with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which said branch railroad would be constructed and of the non-existence of any agreement between the defendant and Southern Railway as alleged, then the defendant is not responsible for the non-appearance of the alleged sale or purchase of the land between the plaintiff and *and* the alleged purchaser, and you should find for the defendant.

Farnsworth *v.* Duffner, 142 U. S., 43.
Slaughter's Admr. *v.* Gerson, 13 Wall., 379.
Farrar *v.* Churchill, 135 U. S., 609.
Southern Development Co. *v.* Silva, 125 U. S., 247.

Rejected.

The court overruled the motion of the defendant and rejected instruction No. 5 as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted, and the said exception was then and there noted by the presiding justice upon the minutes of the court.

122 Counsel for defendant moved the court to instruct the jury as follows:

6. If the jury believe from the evidence that an option for the sale or purchase of said 10,000 acres of land was signed by the defendant as the President of the Virginia Coke and Steam Coal Company on the 24th day of July, 1902, and delivered to the alleged purchaser, or to T. J. Easter, its president, either directly or through the hands of the plaintiff; or that said option was executed and delivered upon the advice or at the instance of said plaintiff, or with his approval or consent, and with knowledge of its contents; and that said option embraces all prior negotiations and agreements between the plaintiff and the defendant upon the subject and is the result of the efforts and work of such plaintiff under his agreement with the defendant to find a purchaser for said land up to that time; that no modification of such option has ever taken place; that no condition is contained in said option concerning any agreement between the plaintiff and the defendant in regard to the construction by the Southern Railway Company of a branch railroad into said land, or concerning any representations of the defendant in regard to any such agreement; that the plaintiff and alleged purchaser accepted the said option and the conditions therein expressed for the purposes therein named, and, in accordance with the terms thereof, proceeded to go upon the land and make an investigation and examination of the same; that the plaintiff did not procure from the alleged purchaser or from T. J. Easter or consummate a binding and enforcible agreement for the purchase of said land at the price fixed by the defendant as named in the declaration; if you believe the above to be the facts of the case as gathered from the proof and that the option expresses the intention and understanding of the parties at its date, and that no modification thereof has taken place, the plaintiff

123 is not entitled to recover on the allegations in his declaration.

Rejected.

The court overruled the motion of the defendant and rejected instruction No. 6 as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted, and the said exception was then and there noted by the presiding justice upon the minutes of the court.

Counsel for defendant moved the court to instruct the jury as follows:

7. If the jury believe from the evidence that the defendant represented to the plaintiff that he had obtained any consent or agreement from the Southern Railway Company to construct a branch railroad into the lands located in Letcher and Harlan Counties, Kentucky, for which the defendant desired to find a purchaser and for which the

plaintiff undertook to find such a purchaser, and that the plaintiff did not rely on the said representations and was not actually misled thereby to his injury, and that no concealment or attempted concealment by the defendant of the actual facts, circumstances and conditions existing and pertaining to or concerning the construction of the proposed branch railroad, but that said plaintiff regardless of any such alleged representations on the part of the defendant, inspected and investigated for himself, either directly or through and in connection with others, the truth of the existence of any such consent or any such agreement between the defendant and the Southern Railway Company, and also as to the actual facts as to the conditions, terms and guarantees upon which the Southern Railway Company would construct said branch railroad, by personal interviews or written communications by the plaintiff, or by inter-
124 views and communications of others in plaintiff's behalf, with Mr. Spencer, President of the Southern Railway Company, or with Mr. Finley, the first vice-president of said Railway Company, subsequent to the time of the authorization given to the plaintiff to find a purchaser for said land, namely in April, 1902, for the purpose of investigating and ascertaining from the said officers of the Southern Railway Company the conditions, terms and guarantees relative to the improvement and development of the said land by the owners thereof, upon which the said Southern Railway Company would assure the construction of a branch railroad into said land, namely, as to whether the starting of such improvement and development of said land by opening one or two coal mines and establishing 200 coke ovens would be sufficient to induce the Southern Railway Company to construct the said branch railroad into said land, you should find for the defendant.

Farnsworth *v.* Duffner, 142 U. S. 43.
Slaughter's Admr. *v.* Gerson, 13 Wall., 379.
Farrar *v.* Churchill, 135 U. S. 609.
Southern Development Co. *v.* Silva, 125 U. S., 247.

Rejected.

The court overruled the motion of the defendant and rejected instruction No. 7, as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted, and the said exception was then and there noted by the presiding justice upon the minutes of the court.

Counsel for defendant moved the court to instruct the jury as follows:

8. The burden of proof on the issue of the plaintiff having found a purchaser for the defendant's land, who was willing, able, capable and ready to purchase 10,000 acres of such land—is upon the plaintiff; and if the jury believe from the evidence that the plain-
125 tiff has failed to prove that there was any such corporation as the Tri-State Coal and Coke Company of Pennsylvania, or has failed to prove that there was any such corporation as the Tri-State Coal & Coke Company of Pennsylvania in existence at the date of the alleged sale of 10,000 acres of defendant's land to it; and has

failed to prove that said alleged corporation as a corporation in fact, was, ready, willing and had the financial ability to purchase and pay cash for 10,000 acres of defendant's land at $20 per acre, and has failed to prove that authority was given by the board of directors of said alleged corporation to T. J. Easter, its president, to make an arrangement to purchase, or to purchase said land for and in the name of said corporation, and has failed to prove that the acts of said Easter relating to negotiations to purchase said land or the alleged purchase thereof were never ratified by the board of directors or other proper authority of said corporation, or if the plaintiff has failed to prove either of the allegations of the declaration in this respect, then the plaintiff cannot recover upon the allegations of the declaration.

Rejected.

The court overruled the motion of the defendant and rejected instruction No. 8 as prayed for, to which ruling of the court counsel for the defendant, during the trial, and before the jury rendered their verdict, duly excepted, and the said exception was then and there noted by the presiding justice on the minutes of the court.

The court, after having heard the objections and arguments of counsel on both sides to the motions for prayers for instructions, one offered by the plaintiff and eight offered by the defendant, ruled upon said motions, and in ruling thereon, before finally granting or rejecting them or any of them, made the following statement in the presence and hearing of the jury which had been duly em-
126 paneled and sworn and was at the time such statement was made in the jury box engaged in the trial of said case, to which statement counsel for the defendant at the time and during said trial, and before the jury had rendered their verdict, but not until after said statement had been fully made and completed, without application or request by or on behalf of the defendant that the jury should be excused or withdrawn during the discussion as to the allowance or rejection of the said prayers or the Court's rulings in respect to them, duly excepted, and the said exception was then and there noted by the presiding justice upon the minutes of the court.

The court's statement addressing the counsel who had argued the instructions, was as follows:

Now, gentlemen, after considering this case and all the evidence, we find, after all, in my judgment, that it is simple. The prayers of the defendant in this case are nearly all correct as abstract principles of law, without passing upon the particular verbiage. I mean the general principles are true as abstract principles of law. There is no doubt in the world I expect that if I undertake to sell a horse to a man and tell him that that is a bay horse, and he has seen the horse, and I say it is fifteen and a half hands high, or sixteen hands high, &c. after he has looked at the horse and has had an opportunity to measure the height, and when he finds that it is only fifteen hands, he cannot on the misrepresentation made rescind the sale or have a right to do it, because it is apparent that it was perfectly open for him to make an investigation. Just as in the Slaughter case, which I think was a case where the party represented that the vessel drew

a certain draft of water. Even in that case the party went to the extent of examining it and found it drew more than that represented.

Now, that was a matter that was perfectly open to the party
127 who was examining it, and who knew exactly the circumstances, and therefore he had no right to be misled and could not say he had been misled. He knew that the boat was different from what had been stated to him at the time, and to say that he had been misled was to cast a doubt on his own good sense. And in the case in the 142d United States, the parties had examined the title; they had heard complaints made about the title, that it was a "pole cat" title, and they had sent their own lawyers to make an examination on the subject, who, having examined it, reported the title good. Now, what did the misrepresentation amount to there? What right had they to say that they relied upon the representations of the party, when they had investigated the title themselves, or had it investigated through their representative, and he reported that it was good? They accepted it, not upon the representation made to them, but they questioned it, and sent their own lawyer to examine it, and he examined it and reported upon it, and they must have acted on their lawyer's advice. If they did not, they acted with their eyes open, and they had no right to make complaint about it.

Now, see how this case differs, if it differs at all, from that proposition of law. It frequently arises in cases of representations made about land, its location, &c. Of course the law says where the location was known, and they saw the land and knew what road went by it, and whether it was near this village, which he asserted it was near, and having these representations made to him, and having seen himself where it was, he cannot afterwards say that he bought it upon these misrepresentations.

Now, this case is different from those cases, because this is a case between the principal on the one hand and the defendant who was desired to sell certain lands, as his agent. And he has come into a formal agreement with the plaintiff. Now the question is for the jury to decide, of course. I am not passing on any facts.
128 The jury understand I am not passing on a single fact in this case. They must pass on these themselves.

But the contention here is that the defendant told the plaintiff that he had this land, that he would give him a certain amount, $2.50 an acre for the whole or any considerable part of the land which he was able to sell, that it was coal lands, and that he had made arrangements with the Southern Railway by which it was to put into that land a railway, which would be an efficient means of placing the coal on the market.

Now, the testimony of the plaintiff shows that he would not have made any effort to sell this land except for the statement that the Southern Railway told the defendant that they would build this railroad, because he knew that coal lands lying out in mountainous districts that could not be reached, were not saleable property unless they could be supplied with transportation.

Now, then, with that statement in view, he proceeds to get a purchaser. After various statements he writes or telegraphs to the de-

fendant that this property could not be sold by him unless he has—he writes to know what requirements the railroad company will demand of a purchaser before they will build the road, that that is the crucial point. That thereupon the defendant writes to the plaintiff that they make no requirements whatever, that they will build the road, and that they do not ask any requirements on the part of the purchaser about the developments or of the developments they would make.

Now it goes along until they get to the option. They meet on the 4th of September. The purchaser says, we are ready to purchase this property, but we must have something from the railroad company other than the bare statement of yourself or your principal that they will build this road, because this property would be of no value to us if this road is not built. And thereupon this defendant shows that there was nothing in writing, but that it could be
129 gotten in writing. The defendant thereupon attempts to get it in writing, and he failed. After that all parties seem to go to work to try to carry out this purchase by trying to get the railroad company to do the very thing that the defendant had told the plaintiff, according to the plaintiff's assertion that they had promised to do.

Now, the plaintiff in this case had brought to the defendant a purchaser. That purchaser was ready, and able and willing to comply, so he says, with the purchase, provided some statement, even a letter from the railroad company could be gotten.

Now, it will be observed that the prayers of the defendant do not specify any given time at which this plaintiff commenced to make inquiries; if he had commenced to make inquiries of this road at the beginning, when he had first taken the contract, or shortly afterwards, and had sought to acquire from the railroad some promise that they would build this road, or that he knew the circumstances that they had not promised to build any road and they would not give the guarantee to build the road or say they would built it, then he would unquestionably come within the provisions of these authorities, that, although having a statement from the plaintiff that the railroad promised that it would build the road, still, upon investigation having found they would not build the road, that he thereupon could not say that he had been deceived by the representations of the defendant, because he had made inquiries which were the very subject matter and the important fact in this case, to wit, would the railroad be built, and therefore he could not be heard to complain. But the prayers are all based on the theory that after the purchaser was ready to comply with the sale, and that was the only thing that prevented the sale, that because he afterwards in order to consummate that sale, and then undertook to try to induce the railroad to build, and then found out the true condition
130 of things, that having done it at that time, he is not entitled to recover in this action.

It seems to me it would be saying this: that, having endeavored to overcome the misstatements and misrepresentations of this principal, having endeavored to give that principal the benefit of the

very thing about which he misrepresented, conceding he had misrepresented about it, that therefore he was to be punished for endeavoring to carry out in this case what the principal had said. Surely no principle of law would sustain such a contention as that.

Therefore, I say, that the prayers cannot be granted because they do not undertake to refer to any time prior to the actual consummation of this sale. So that the rule, which, as I say, as an abstract principle of law is good, is not true in this case, because the principle which it invokes would be directly against the *bona fides* of any man's effort to carry out what he had undertaken.

Now, in respect to the last prayer, the 8th or 9th, or whatever it is, the Court is asked to say that, because the plaintiff in this case had not proved that the president had not the authority of the directors to make this purchase, therefore the plaintiff in this case cannot recover.

Now, when you examine the case, you find that there has not been a syllable in the entire case, or during the pendency of these proceedings, in which the defendant has ever questioned the fact that this coal company was a corporation. There has been no time when he questioned that the president was not authorized by the directors, but on the contrary the defendant, having been brought in contact with this very company on the 4th of September and prior thereto when the option was given, in August—was it in August?

131 Mr. DARLINGTON: July.

The COURT (continuing): When the option was given in July, it is given to the Virginia Coke and Steam Company.

Mr. DARLINGTON: It was given to Easter.

The COURT: It was given to Easter by Dotson.

Mr. DARLINGTON: The Virginia Coal and Steam Co.——

The COURT: By the Virginia Coal and Steam Company to Easter, the president. I thought it was given to the company, but it seems to have been given to Easter instead. And, when the letter was written, it was written as to the company, whatever it is which I have forgotten, of which Easter is the president. And the defendant in this case recognizes that fact by speaking of the company, although he knew that he had given the option to the president of the company, to wit, Easter.

So there is nothing in the negotiations that could have put the plaintiff upon any notice of any kind or description that such a question as that could be raised. And therefore, it seems to me, it would be unfair. Independent of that, I think that the case referred to the other day in the 160d United States quite sustains the proposition contended for by the plaintiff in this case in that respect, because I think this was a stronger case.

In that case the railroad had undertaken to lease and to insure a hotel property. Now, a railroad company is not ordinarily supposed to have much to do with hotel property. It was not a hotel property for the people to stop at from their trains to get their dinners or lunches or whatever it may be, but it was at the end of the road, and it was built by the Hotel Company for the accommodation of passengers on the road.

In that case, it was contended that the president, who entered into this contract, had no right to lease the hotel, and he had no
132 right to give this assurance that they would insure the hotel. But the Supreme Court said that anything done in connection with the business of the company will be presumed to have been authorized when the President does it. It was stated in that case in this way: that if anything were to be done by a president which would operate against the company in its legitimate business, and for the legitimate purpose for which it was a company, then the rule might be different, but it concludes the case of leasing this hotel as within the natural purview of the charter of the company, which was to run a railroad.

Now, in this case the purpose of the coal company is to work coal mines and ship and sell coal. And here the president has undertaken to buy additional coal lands for the purpose of mining it and selling and shipping coal and coke, directly within the purview of a coal and coke company to buy and sell coal, &c. But in addition to that, this case seems to be stronger than the 160d United States, because there only the president was concerned, while in this case the president, the secretary, and one or two directors of the company, and the general counsel of the company, too, were concerned. I don't understand how Judge Potter could be judge of the Supreme Court and general counsel of the company. That is the statement. I believe they have larger privileges, to act as ordinary lawyers and practice law and be judges too.

Mr. DARLINGTON: He is an ex-judge.

The COURT: I assumed so. And they took a part in it and made an investigation of it.

So, I think that, in view of the 160d United States, it would be rather strange on the part of this Court that these things had to be shown when they seem to be recognized by the defendant himself, or, if not recognized, at least by the decision in the 160d U. S. it would come within the purview of that decision.

133 Now, I believe that the whole theory upon which this case ought to go to the jury is simply upon the general theory set out in the plaintiff's prayer. I think that is the correct proposition to submit to them. It covers a good deal of the statements made by counsel for the defendant.

(The Court reads the prayer of the plaintiff down to the words "expended time and effort in the attempt.")

The COURT: Relying on the said representations. I say he must have relied on the representations.

(The Court concludes reading said prayer.)

The COURT: I ought to have said that I don't see that the option plays any part in the way that counsel seem to think it plays, because it was not intended to put in that opinion any of the various agreements or contracts between the plaintiff and the defendant, but it was merely giving an option to purchase the agreement between the plaintiff and defendant could not have been represented in that option, but the failure to agree on the 4th of September was

really the basis of the suit as between these parties. It seems to me that would only be a fair and proper statement of the case.

So, Gentlemen, I shall grant the first and only prayer of the plaintiff and reject all of the prayers of the defendant.

Mr. MAY: Of course, your Honor, we reserve our exceptions.

The COURT: Certainly.

Mr. Chief Justice Clabaugh then instructed the jury as follows:

134 *Charge to the Jury by Justice Clabaugh.*

Gentlemen, as a preliminary to stating the law of this case I want to call to your minds what I have said to you so frequently during your term of service here on the jury, and that is something I am sure you know already, that you are to be guided by the evidence given by the witnesses in a cause; that what counsel may say in their statements to the Court, or what the Court may say in its statements to counsel, in respect to the facts involved and the law, you have been time and time again told and I now tell you again, you have no concern with that, and have no right to give the slightest attention to it in any way. Therefore, in passing upon this question, you will not take anything into consideration that the Court has said to counsel in respect to the facts in the case, but you will decide this case in accordance with the evidence that the witnesses have given before you, and the law as the Court will give it to you. This is the only basis upon which you can decide this case.

Now, gentlemen, the case itself is one which I am sure you thoroughly understand, and I shall not consume very much time in instructing you.

In this case, as in all cases, the burden of proof is upon the plaintiff to satisfy you by the weight of evidence that a contract was made in this case between the plaintiff and defendant, and under that contract he was to secure a purchaser for the entire property, or a considerable part of it, at $20. per acre, and for which he was to receive $2.50 per acre; and that he must further show that in accordance with that contract he procured a purchaser who was able and willing and ready to buy. And if he has shown these facts
135 by the weight of evidence, then the plaintiff in this case is entitled to recover upon the basis of what you have found the contract to be, if you find he has proven it by the fair weight of the evidence.

Therefore it is consistent with that view of the case that the Court gives you this instruction:

If the jury believe from the evidence that the defendant on or about the 20th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan County Coal lands at the price of $20. per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he

should find a purchaser at and for the price of $20. per acre, and that shortly thereafter, namely, on or about the 8th day of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into the said property without placing any requirements on the purchaser or holders of the said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the defendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready and willing to purchase ten thousand acres of the said land at the said price provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representation that the said railway company had so consented or agreed to construct a branch railroad into the said coal lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the said ten thousand acres or $25,000, in all.

136 So that what you are to pass upon in this case, and what the plaintiff must prove by the fair weight of the testimony is this: Was there an agreement entered into by the plaintiff and defendant in this cause that the plaintiff should secure a purchaser for the defendant of this land or a considerable part of it, at $20. an acre, and for which he was to receive, that is, the plaintiff, $2.50 an acre commission for the sale. And was the representation on the part of the defendant to the plaintiff that the Southern Railroad Company was to build a railroad into the land in question, a part of the agreement; and when that statement was made, did the plaintiff in this case rely upon it and act upon it? and subsequently did he find a purchaser for the amount of land, 10,000 acres? And did the defendant—gentlemen—I am trying to make it plain, but I am afraid I have made it confused; and that the defendant represented to the plaintiff that the Southern Railway was to build in there, and that the plaintiff made these representations to the purchaser or intended purchaser, and that the latter relied upon those representations and had agreed to buy the land in question upon that condition, and that the sale of the land was prevented because of the failure of the representation, if you find that the defendant made that representation to the plaintiff in this case; and that the purchaser was ready and able and willing to take and pay for this land, but that the purchase was prevented by reason of the fact that the railroad company had not agreed to build any railroad in there, provided you find that the defendant in the case had so told the plaintiff in the case, to wit, that it had promised to build a railroad into the land in question.

So that those various items are before you in this prayer. I ought not to have said a word, because the prayer itself indicates to you what it means.

137 Therefore, if you believe from the evidence that the defendant on the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of these Harlan County coal lands at the price of $20. an acre, that he had obtained

from the Southern Railway Company its consent or agreement to construct a branch railroad into said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20 an acre; and that shortly thereafter, namely, on or about the 8th of May, 1902 he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into the said company without placing any requirements on the purchasers or holders of the said land to put in any certain size of plants or number of coke ovens, and that the plaintiff relying upon said representations of the defendant—you must find, of course, that the plaintiff in this case relied upon these representations made by the defendant—if you find he made them, and that the defendant relying upon the said representations expended time and effort in the attempt to find a purchaser, and did find a purchaser—not only that he attempted to find one but that he did find one—ready and willing to purchase 10,000 acres of said land at the said price, provided the defendant's said representations were accurate, and that the said sale failed because of the inaccuracy of the defendant's representations that the said railroad company had so consented or agreed to construct a branch railroad into said coal lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 an acre on the said 10,000 acres, or $25,000 in all.

Now, I am afraid that in trying to explain it and make it more definite I have made it less definite than this prayer itself
138 would have made it. But I have gone over the prayer now to make sure that I had not said anything in the previous part of my instruction that would confuse you, and which I may have done by endeavoring to make a plain thing plainer you sometimes confuse it. But I trust you have been able to understand exactly what the law provides as the Court understands it.

Now, gentlemen, if you find for the plaintiff in this case, of course, you know you find for the plaintiff and then assess the amount of your verdict. If you find for the defendant then you simply say "For the defendant," and that is the end of it.

Mr. DARLINGTON: Will you state to the jury that it is within their province to allow interest on this sum from the time of the failure of the contract?

The COURT: Yes, it is within your province to allow interest or not, *and* you deem best, for the plaintiff, if you find for him.

You may retire.

Wherefore the defendant prays the said Chief Justice to sign and seal this his bill of exceptions, which is accordingly done, now for then, this 30th day of December, A. D. 1905.

HARRY M. CLABAUGH,
Chief Justice.

139 *Præcipe for Transcript.*

Filed January 2, 1906.

In the Supreme Court of the District of Columbia.

At Law. No. 45930.

WILLIAM A. MILLIKEN, Plaintiff,
vs.
NAPOLEON B. DOTSON, Defendant.

The clerk will please prepare the transcript of the record on the appeal in this cause, the defendant hereby designating the following to be included therein:

1. Declaration.
2. Pleas.
2½. Demurrer and Judgment thereon.
3. Joinder of Issue.
4. Verdict and the amount thereof.
5. Judgment, entry in Minutes 47 page 197.
6. Memorandum of approval and filing of appeal bond for costs.
7. Citation.
8. Bill of Exceptions and order making of record.
9. This præcipe.

GEO. C. HAZLETON,
Attorney for Defendant.

Service and copy of the foregoing præcipe acknowledged this 2" day of January A. D. 1906.

J. J. DARLINGTON,
Attorney for Plaintiff.

140 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 139, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45,930 At Law, wherein William A. Milliken, is Plaintiff and Napoleon B. Dotson, is defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 9" day of January, A. D., 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1642. Napoleon B. Dotson, appellant, *vs.* William A. Milliken. Court of Appeals, District of Columbia. Filed Jan. 10, 1906. Henry W. Hodges, clerk.

TUESDAY, *April 10th, A. D.* 1906.

No. 1642.

NAPOLEON B. DOTSON, Appellant,
vs.
WILLIAM A. MILLIKEN.

The argument in the above entitled cause was commenced by Mr. J. H. Wood, attorney for the appellant, and was continued by Mr. J. J. Darlington, attorney for the appellee, and by Mr. A. S. Worthington, attorney for the appellant.

On motion, both sides are allowed to file supplemental briefs herein if so advised.

WEDNESDAY, *April 11th, A. D.* 1906.

No. 1642.

NAPOLEON B. DOTSON, Appellant,
vs.
WILLIAM A. MILLIKEN.

The argument in the above entitled cause was concluded by Mr. A. S. Worthington, attorney for the appellant.

No. 1642.

NAPOLEON B. DOTSON, Appellant,
vs.
WILLIAM A. MILLIKEN.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a judgment for $25,000 rendered in an action of assumpsit.

The declaration of the plaintiff, William H. Milliken, alleged the following facts substantially: In April, 1902, the defendant, Napoleon B. Dotson, represented to plaintiff that he owned and controlled 124,000 acres of coal lands situated in Letcher and Harlan counties, in the State of Kentucky; that he had secured an agreement with the Southern Railway Company to construct a branch railway into said lands; and that he desired to secure a purchaser for either the whole or a considerable part of said lands, at and for the price of $20 per acre. That if plaintiff would find a purchaser at said price defendant would allow and pay him $2.50 for each acre for which he should find a purchaser. That relying upon such representations and promise plaintiff applied himself diligently to find a purchaser or purchasers, and after much labor and the ex-

penditure of much time and about $2,500 in money during the space of five months, procured and furnished a responsible purchaser, namely, the Tri-State Coal and Coke Company of Pittsburg, Pa., which was, on to wit, September 15, 1902, ready, able, and willing to purchase 10,000 acres of said lands at $20 per acre in cash, subject only to the truth of defendant's representations in respect of the construction of the railway into said lands. That it then transpired that the defendant's said representations were untrue, and that there had been no agreement to construct said railway. That had it not been for the said representations plaintiff would not have undertaken to find a purchaser. That for the reason aforesaid, and without plaintiff's fault, the said purchaser declined to proceed further in the matter of purchase. A second count stated the same facts substantially, and was followed by the ordinary common counts. Defendant filed several pleas, which were stricken out, and the case was submitted on his plea of non-assumpsit.

Plaintiff introduced evidence tending to show the following facts in support of his declaration: That he heard of the proposed sale of defendant's lands in April, 1902, and received a letter from defendant dated April 24, 1902, relating to the offer of sale and suggesting a meeting, and containing the following paragraph: "We have arranged with R. R. companies to build a branch into it and develop the lands." A typewritten, unaddressed letter accompanied this, which, after describing the rich veins of coal in the lands, contained this statement: "We have an understanding with the railroads near the lands, by which they are to build a branch into the same for us as soon as we are ready to open up coal veins and put in coke plants." A prospectus was inclosed also, which contained a lengthy description of the lands, the extent of the coal seams, and an extract from the official report of the State geologist, John R. Procter, showing that the coal of the particular region was of an excellent quality. It contained a statement of the nearest railway lines and that, "the L. and N. and Southern railways have both offered to build into this property at once," and the following: "The property having been made up by grouping together smaller tracts, it will be sold in any size tracts to suit purchasers, and can be laid off and sold in separate blocks, so as to render each block desirable and well located for coal and coke plants, or it will be sold together," etc. That by appointment, he met defendant in Washington on April 30, and told him he was familiar with the section and knew the land and its value, but that the important thing was the railway to get to market. That defendant said he had an arrangement with Spencer of the Southern Railway to build a road in there from Middleboro at once, and that the surveyors were in there locating a line from Middleboro to Harlan Court House, which is just at the edge of the land. That he then agreed with defendant to visit Pittsburg and secure purchasers for the property at $20 per acre, and defendant agreed to pay him $2.50 per acre for every acre that he could sell in such quantities as he could find purchasers for; plaintiff to pay his own expenses. That plaintiff would not have gone into the mat-

ter without the assurance as to the railway, because it was necessary to the utilization of the coal. That plaintiff at once went to Pittsburg and began negotiations with parties there. That the first question asked him by them was in regard to the contract for the railway construction; and upon plaintiff's replying that he had not made the contract, but that defendant had represented to him that there was such an arrangement, Easter, of the Tri-State Coal and Coke Company, with whom he was dealing, insisted that plaintiff should have something in writing from defendant to that effect. That, communicating this fact to defendant, he received a letter from him, dated May 3, in which he referred to the general nature of the land, advantages, etc., but the only reference to the railway was in the following language: "This is property which will be developed by the building of the K. R. through it at once, which will increase the value of it several times over." That the Pittsburg people were not satisfied, as they feared there were some conditions attached in regard to building the road, and insisted that plaintiff should state what conditions, if any, were attached. That on May 8 plaintiff, in carrying out this suggestion, sent the following telegram to the defendant, who was then in New York: "See Spencer and write me to-night how much development he will require before building road into property. Would two hundred coke ovens be sufficient to start with?" That a letter of the same date in reply was received in due course of mail, which contained the following: "I have already discussed fully with Mr. Spencer the point with reference to extent of development he would like to have on the property to commence with, and am glad to say that Mr. Spencer is willing to build the road into the property without placing any requirements on the property holders to put in certain sized plants, or any number of coke ovens. I have explained fully to Mr. Spencer our plans for the development of the land, and he is now ready to commence work on the road just as soon as we are ready for him to do so, and we can use our own judgment to the extent of the development we would put on the lands to commence with. Mr. Spencer has investigated the situation and knows the Southern and Louisville and Nashville Railroad can furnish a market for a vast amount of coal and coke from this field." * * *

That Easter seemed satisfied with this letter which was shown to him, and agreed that he would take the matter up if plaintiff would procure samples of the coal and have it tested in Pittsburg to see if it would make good coke. That plaintiff went to Wise County, Virginia, where defendant lived, and with a friend, under the direction of a guide furnished by the defendant, rode over the mountains and spent a week inspecting the lands. That he returned to Pittsburg May 27 with samples of coal, the first analysis of which was not satisfactory; but a second was better. That Easter was pleased and proposed to go with plaintiff to see the lands in company with a mine expert. That correspondence passed between plaintiff and defendant at frequent intervals. One letter from defendant dated May 29, and relating to sending samples of coal, had this postscript: "I

understand the Southern Ry. Co. has secured their right of way with exceptions of through one or two tracts from Middlesboro to Harlan C. H. I hope, however, Mr. Spencer will call his men out and keep them out until we get our tracts rounded up as we have requested him to do. I presume your people will be in a position to give us a definite answer as soon as they have tested the coal. We have another proposition from a party wanting an interest down there and would like to have your people conclude as soon as possible." Another letter of defendant, dated June 12, expressed satisfaction with the result of the experiments with the coal and said: "The engineers are now locating the line of the Southern into our property. It would not be necessary for me to accompany Mr. Easter to see Mr. Spencer, as Mr. Spencer's plans are already fixed, he would not hesitate to say to Mr. Easter that he will build the road into that section at once." In another of July 8, repiying to a complaint of plaintiff that one Ingraham had offered the same lands for $15 per acre, and explaining the same by stating that the price had been raised by reason of the railway arrangement, he said: * * * "the R. R. is now located to near the property and work will soon be vigorously pushed, and, of course, price will very soon be higher." That a letter of July 9 contained the following: * * * "and if your parties get advantage of this low price they will have to act promptly, as R. R. will soon be built and the price will advance greatly. How much do your people want? Do they want the entire tract or do they want only part of it? If you will let me know the exact number of acres they want to purchase, if they find the coal satisfactory upon further investigation, I will place you in a position to give them refusal of the property for sufficient time to look it over and say whether or not they want it * * * We are now having titles abstracted, surveys made, etc., and no long option will be given on the property. Appreciating the amount of work and expense you have been to in trying to handle the property, we will give your people time to look the property over and give me a definite answer as to whether or not they take it." That the following option was proposed and executed by defendant, who knew that Easter was president of the Tri-State Coal and Coke Co., and represented it in the transaction:

"Virginia Coke and Steam Coal Co. hereby grants to T. J. Easter, of Pittsburg, Pa., an option to purchase ten thousand acres of land in Harlan County, Ky., at the price of twenty dollars per acre, at any time within sixty days from this date, in consideration of and on condition that the said T. J. Easter shall forthwith send an engineer to examine and report on said lands. Said examination to be completed and report made and said Virginia Coke and Steam Coal Company notified within thirty days from this date, and upon receipt of said report, said T. J. Easter shall elect as to whether or not he will accept this option and purchase said property, and if on receipt of said report, the said T. J. Easter notifies said Va. Coke and Steam Coal Company of his decision to purchase the said lands within said thirty days, then the said purchase is to be completed,

the money paid and deed in fee to said land executed within sixty days from this date.

"Witness the following signature on this 24th day of June, 1902:

"VIRGINIA COKE AND STEAM COAL COMPANY,
"By N. B. DOTSON, *President.*"

That the investigation made by experts was satisfactory, and the Pittsburg parties agreed to take 10,000 acres at the price named. That plaintiff had no authority to execute a contract for sale and telegraphed defendant to come. That defendant arrived in Pittsburg on September 3, 1902, and the parties all met in plaintiff's room in hotel. That the Pittsburg people announced themselves ready to take 10,000 acres of the land, but must have assurances in regard to building the railroad. Defendant then said he had simply a verbal arrangement with Spencer, but that he could get a letter from Spencer saying that he would build a road through there at once, and also said that engineers were there locating the road, and there would be no question about it. That the purchasers announced that a letter from Spencer would be satisfactory. That defendant asked plaintiff to go to New York and see Spencer and get the letter. That he did so and found that Spencer had gone to Europe. That plaintiff told the purchasers the situation and asked them to give him more time to get a letter from Spencer before abandoning the purchase. That, not having obtained the letter from Spencer in the meantime, the purchasers, in the latter part of October, announced to plaintiff that they could not wait longer, and were making arrangements for other coal lands. The evidence of Samuel Spencer, in connection with correspondence between him and defendant, tended to show that there had been no agreement with defendant to build his railway into the lands. That the same was contemplated, and preliminary surveys made, and so forth, but that all was based upon satisfactory assurances of a sufficient amount of business, which had not been obtained.

The testimony of Thomas J. Easter, called for plaintiff, tended to show that he was the president of the Tri-State Coal and Coke Co. of Pittsburg, and represented it in negotiations with plaintiff for the purchase of coal lands in Harlan Co., Kentucky. That he was not willing to invest in any property that could not be developed almost immediately. That plaintiff produced defendant's letter of May 8, 1902, stating that he had completed arrangements with Mr. Spencer to construct a road into said lands without any particular assurances as to improvements that would be necessary. That after procuring the option Wilson and Koonts, representing the Coal and Coke Co., made a trip over the land. That in an interview with defendant in September, in Pittsburg, they informed him that they would take 10,000 acres at $20 per acre if he could show some tangible arrangement between himself and the railway company to build the line. That defendant said he had Mr. Spencer's assurance to build the road whether operations were begun at once or not, but not in writing, and that Mr. Spencer's word was as good as

a written contract. That defendant promised to effect a meeting between ourselves and the railroad people, at which meeting he was sure a written agreement could be had. That nothing had since been heard as regards willingness to proceed with the railroad. That he did not buy the land for the reason that there was no arrangement for the construction of the railroad. That we failed to close at that meeting because defendant could not assure us that any railroad would be built, and therefore gave up the matter and purchased coal lands elsewhere. That they would not think of buying lands in that section without a railroad, and had refused to take up the matter seriously until shown the defendant's letter of May 8, 1902. That at an interview thereafter defendant stated there was no question about the railroad being built, that men were then working on the road while we were there, and had been taken off at the present time by an arrangement between him and Spencer to enable defendant to secure further options. That witness wrote a letter to Mr. Spencer on August 23, 1902, making inquiry about the railroad, which was replied to by W. W. Finley, second vice-president of the Southern Railway Co. on August 29, 1902, in which he said: "The construction of a line in the territory mentioned by you is now under investigation and consideration, but no final conclusions have been reached. Conclusions in the matter would be greatly facilitated if we could be advised from time to time of actual developments which parties in control of the lands contiguous to such line would obligate themselves to undertake. I shall be pleased to hear from you further on the subject." That the interview with Dotson, at Hotel Henry, was subsequent to the receipt of the letter from Finley. That witness had the letter, but did not show it to Dotson. That while they had their own ideas that no railroad would be built, they had been given to understand by Milliken that a *bona fide* agreement existed between Dotson and Spencer, and Dotson at the meeting gave them to understand that such agreement did exist though not in writing. That they refused to take the matter up on Dotson's letter in October for the reason that they had purchased and begun operations in another field. That they abandoned the proposition to purchase some time after this meeting, and that the failure of Dotson to produce evidence of the agreement to construct the railway had everything to do with the decision not to purchase; that they decided at once after the meeting at Hotel Henry to abandon the idea of purchasing the land.

W. W. Finley testified to the letters produced, and to a conference in New York on September 23 with Dotson and one Perin, who had negotiations to purchase; but did not remember that Milliken was present. That the matter of railway construction was then "drifting along."

In connection with plaintiff's evidence was also read a letter to him, addressed to Pittsburg, on August 26, 1902, replying to his telegram relating to the offer of the parties, and containing the following: "Your telegram informing me that your parties have decided to take ten thousand acres positively, and possibly twenty thousand acres, is received. I presume you will have heard from Mr.

Spencer before this time, and you will be down at once to close the matter up." This was posted at Wise, Virginia, where defendant resided. The letter of plaintiff, following the telegram aforesaid, was dated August 25, at Pittsburg, and contained this statement: "I have met Mr. Easter and they have decided to take the 10,000 acres of coal lands, on condition that Mr. Spencer will assure them as to the building of the railroad to Harlan C. H. They have written to Spencer and stated what they proposed doing, and asked as to the railroad. So, if his answer confirms what you have represented on this point, they will close the purchase for 10,000 acres." Then followed a complaint that Easter had letters from two other parties offering some of the lands at $12.50 and $15 per acre, and that some other parties had gotten the analysis that had been made for plaintiff, and warning him that no deal must be made with Easter and his people, the Tri-State Coal and Coke Co., at less than $20, and only through plaintiff, unless *you* are willing to reduce the price on your own account without affecting me." This paragraph then followed: "But this would be utterly unnecessary. They have made up their minds to buy the 10,000 acres at $20 if they can not get it for *less*, if Mr. Spencer satisfies them he will build the road. If he does not, they do not want the land at *any price*." There were other letters from plaintiff to defendant during September, 1902, tending to show that plaintiff was still trying to get some satisfactory statement from the officers of the Southern Railway Co. (Mr. Spencer being still in Europe), concerning the building of the railway. Defendant testified that at the meeting with plaintiff in April, 1902, he authorized him to sell at $17.50 per acre, agreeing to give him all that he could get in excess of that sum. He also read in evidence the correspondence between him and Spencer in 1902 relating to the railroad construction, that has been referred to in connection with Spencer's testimony. It is lengthy, and does not show that Spencer had ever entered into the alleged agreement to build the railroad, but was giving the matter favorable consideration. He also testified that plaintiff saw one of Spencer's letters of May 13, 1902, and that "Spencer did not say that the road would not be built; said he would consider it favorably."

Defendant also testified that he went to Pittsburg in response to plaintiff's telegram to come and close the deal. That he showed Easter a map of the location of the lands, and explained to them the terms on which the railroad would agree to build. That Easter suggested that defendant would better get a letter from Spencer—something in writing to bind him to construct the road; that they did not think they would go into the matter upon a simple statement from Spencer that he would build the road; and that defendant would have to get a letter from Spencer. That defendant thought if Easter would see Spencer and let him know just what he was willing to do in the way of the development of the property, Spencer would not object to giving him a letter of that kind. That they promised to do that, and said they would arrange to see Spencer, to have a conference to see what arrangements could be made. That at the time defendant gave Milliken a letter of introduction to Spencer

to go and see what arrangements could be made. This letter, dated September 5, 1902, stated that plaintiff calls in the interest of the Pittsburg coal people who want to join us in the development of some of the Harlan Co. coal lands, if they know that a railroad will be built into them in the near future. * * * He further testified that he had all of the Spencer correspondence with him and showed it to Milliken, and, he thinks, to Easter also, and after that Easter said he would not go into the deal unless they got a written contract with Spencer. In regard to the option, he testified that plaintiff brought it to him at his home, and had put in a clause making it conditional on the building of the road, and the defendant changed this.

One Charles P. Perin testified for defendant concerning purchase made by people represented by him of 30,000 acres of the Harlan Co. lands in September, 1902, and that in interviews concerning the railway plaintiff was present with him and Finley, the vice-president of the Southern Railway Co., and plaintiff then knew that no agreement had been made to build the railway. Several witnesses testified to declarations made to them by plaintiff when in Harlan Co., and while he was inspecting the lands, that no railway had been promised to be built, etc.

Plaintiff, in rebuttal, denied the statements made by defendant, by Perin, and by the last-named witnesses.

1. The first assignment of error is founded on exceptions to the following instruction given to the jury at the request of the plaintiff:

"If the jury believe from the evidence that the defendant, on or about the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan County coal lands at the price of $20 per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20 per acre, and that shortly thereafter, namely, on or about the 8th day of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into the said property without placing any requirements on the holders of the said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the defendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready, and willing to purchase 10,000 acres of the said lands at the said price, provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representations that the said railway company had so consented or agreed to construct a branch railroad into the said lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the said 10,000 acres, or $25,000 in all."

It is convenient, and will save some consumption of time, to consider the above assignment of error in connection with those founded on exceptions taken to the refusal of the second and eighth special instructions asked by the defendant, as follows:

2. "If the jury believe from the evidence that the plaintiff entered into the special agreement with the defendant as alleged in the declaration, by the terms of which his compensation or commission depended on the sale of the lands at a stated price, or on procuring a purchaser at the owner's price and terms, and that said plaintiff did not, in accordance with the terms of his said special agreement, effect an actual sale of the land by a binding and enforcible agreement obtained by him for the sale and conveyance of said land to a purchaser who was ready to close and able to perform such agreement of purchase, then the plaintiff is not entitled to recover.

"And if you believe from the evidence that the plaintiff has shown simply a provisional arrangement for the sale or purchase of said land by general negotiation or written option, which may have been accepted or rejected by the proposed purchaser at his pleasure or privilege, and which sale or purchase was never consummated, then the plaintiff can not recover."

8. "The burden of proof on the issue of the plaintiff having found a purchaser for the defendant's land, who was willing, able, capable, and ready to purchase 10,000 acres of such land, is upon the plaintiff; and if the jury believe from the evidence that the plaintiff has failed to prove that there was any such corporation as the Tri-State Coal and Coke Company of Pennsylvania, or has failed to prove that there was such corporation as the Tri-State Coal and Coke Company of Pennsylvania in existence at the date of the alleged sale of 10,000 acres of defendant's land to it; and has failed to prove that said alleged corporation as a corporation in fact, was ready, willing, and had the financial ability to purchase and pay cash for 10,000 acres of defendant's land at $20 per acre, and has failed to prove that authority was given by the board of directors of said alleged corporation to T. J. Easter, its president, to make an arrangement to purchase, or to purchase said land for and in the name of said corporation, and has failed to prove that the acts of said Easter relating to negotiations to purchase said land or the alleged purchase thereof were never ratified by the board of directors or other proper authority of said corporation, or if the plaintiff has failed to prove either of the allegations of the declaration in this respect, then the plaintiff can not recover upon the allegations of the declaration."

(1) We are of the opinion that the foregoing instruction, given at the request of the plaintiff, was a statement of the law applicable to the cause of action alleged and the evidence that was introduced.

It is well settled that when an agent, employed for the purpose, procures a purchaser willing and able to buy on the authorized terms, he becomes entitled to his compensation, although the sale may not be consummated, provided the consummation is prevented by the refusal, fault, or defective title of the principal. Koch *v.* Emmerling, 22 How., 69; McGavock *v.* Woodley, 20 How., 221; Bryan *v.*

Abert, 3 App. D. C., 180, 181; Cheatham *v.* Yarborough, 90 Tenn., 77, 79; Washburn *v.* Bradley, 169 Mass., 86, 88; Holden *v.* Stark, 159 Mass., 503; Knapp *v.* Wallace, 41 N. Y., 477; McFarland *v.* Lillard, 2 Ind. App., 160, 166.

(2) The contract between the parties, concerning which in this particular there was no conflict in the evidence, required the plaintiff to find a purchaser ready, able, and willing to buy on defendant's terms and in accordance with his representations of material facts. He was not bound or even empowered by the terms of his agency to effect an actual sale by a binding and enforcible agreement. Marnix *v.* Hildreth, 2 App. D. C., 251, 275; Fitzpatrick *v.* Gibson, 176 Mass., 477, 478, 479; Middleton *v.* Thompson, 163 Pa. St., 112, 120; McCreery *v.* Green, 31 Mich., 172, 184, 185.

There was no error, therefore, in refusing the defendant's second instruction.

(3) Nor was it error to refuse the defendant's eighth special instruction aforesaid, for however sound the propositions of law therein enounced may be in the abstract, they have no application to the case made by the evidence.

Under all the conditions shown by the uncontradicted evidence, the proof of the corporate existence of the Tri-State Coal and Coke Company, and of its power to make the purchase, was sufficient for the purposes of the case. The defendant knew that the corporation was the proposed purchaser, and that Easter was its president, representing it in the transaction. Knowing this, he approved the action of the plaintiff and came to Pittsburg, upon his suggestion, to execute the contract and receive the purchase money. He was apparently satisfied in respect of the power of the corporation to make the purchase and of the authority of Easter to represent it, for he made no inquiry and asked for no evidence. There was not the slightest indication that he had any doubt upon either point. He accepted the offer, and the only thing that prevented the consummation of the sale, so far at least as he knew or had reason to believe, was his failure to make good his representation that he had a contract or agreement for the construction of the railway to Harlan County Court House. Moreover, notwithstanding the failure then to close the sale, he undertook to remove the purchaser's objection, the reasonableness and materiality of which he did not dispute, and asked the plaintiff to continue the negotiations to that end. It seems quite clear, from all of the evidence, that the objections were the result of afterthought.

The refused instructions also declared that in order to recover it was incumbent upon the plaintiff to prove the financial ability of the purchaser to make good its offer. Whether in actions generally by agents to recover commissions for procuring purchasers, where there has been no consummation of the sale, the burden is upon the agent to show the ability of the proposed purchaser to pay the consideration, or upon the seller to show the want of that ability, is a question about which there is a conflict of authority. Some hold that solvency and ability are to be presumed; others maintain the opposite

doctrine. In view of the particular facts of the case, we deem it unnecessary to express an opinion upon the broad question.

As we have seen, the defendant accepted the purchaser without condition or inquiry. He evidently had no more doubt of its ability to pay the consideration than he had of its authority to make such a purchase.

Whatever doubt there may be as regards the general question above stated, we are of the opinion that when the principal accepts the purchaser without question of his ability to perform, and the sale fails of consummation by his own fault or failure to make good his offer, the burden is upon him, in order to defeat the agent's right to compensation, to show the purchaser's want of ability. Davis *v.* Morgan, 96 Georgia, 518, 520. In that case, where the facts were quite like those in this, the court said:

"Upon this question the authorities are conflicting, but we think the true rule is this: that, as a general proposition, a broker who has been employed to sell is not entitled to recover his commission unless he shows that he procured a person willing, ready, and able to purchase upon the term prescribed by his principal, but where it appears that the proposed purchaser was accepted by the principal, the burden is upon the latter to show that the purchaser was not able to comply with the terms of the contract (citing cases). In the present case, according to the defendant's own evidence, he accepted the proposed purchaser without objection, recognizing him as answering all the requirements; and there is no suggestion that he was not entirely solvent. Indeed, it appears that the failure to complete the sale was due wholly to the defendant's inability to make a good title to the land. This being so, we think the court erred in making the plaintiff's right to recover depend upon whether he had established the ability of the purchaser to pay for the land."

For other cases directly in point see Lockwood *v.* Halsey, 41 Kan., 166, 169; Fairly *v.* Wappoo Mills, 44 S. C., 227, 248.

Another contention urged by the appellant may be briefly considered, though it would seem sufficient to say that it was not made on the trial and has no foundation in any exception that appears in the record. It is this: that the proposition to sell 10,000 acres out of the larger quantity owned by the defendant contained a description too uncertain to be made the subject of an enforcible contract between seller and purchaser.

If a contract had been actually entered into between seller and purchaser, and this was a suit for its specific performance, or an action of damages for its breach, the question might be a serious one, notwithstanding there are many decisions to the effect that such a contract carries with it the right of reasonable selection by the vendee and may therefore be rendered sufficiently certain. Wofford *v.* McKenna, 23 Tex., 36, 46; Cheney *v.* Cook, 7 Wis., 413, 422; Walsh *v.* Ringer, 2 Ohio, 327, 333; Brown *v.* Menger, 42 Minn., 482; Armstrong *v.* Mudd, 10 B. Mon., 144; Lingerman *v.* Shirk, 15 Ind. App., 432, 437; Lander *v.* Peoria, Ag. and F. Assn., 71 Ill. App., 475, 481.

But we have no such case before us. The plaintiff had nothing to

do with this question of uncertainty. He was employed to find a purchaser for the whole tract or any considerable portion of it. He procured an offer for 10,000 acres that was acceptable to his principal. The sale did not fail of consummation through any misunderstanding of the parties as to the land to be purchased, or any controversy respecting it, but solely by reason of the seller's failure to make a good representation of fact that was an essential condition of the sale. Had the seller and purchaser come together upon all other points, and yet failed to consummate the sale by reason of the purchaser's insistence upon an unfair and unreasonable right of selection, it may well be that the plaintiff could have lost his right to compensation. But nothing of the kind occurred, and the failure of consummation was the fault of the seller. Having, therefore, done all that he had contracted to do, he became entitled to the compensation promised therefor. In an analogous case, where a proposition for sale procured by an agent was accepted, and the purchaser made a part payment and tendered complete performance which the seller refused, it was held that the seller could not set up the insufficiency of the contract under the statute of frauds, to defeat the agent's claim for compensation. The court said: "If the plaintiff was authorized to make the sale, he is, under these circumstances, entitled to compensation, notwithstanding that the purchaser could not have been compelled to carry out his contract if he had chosen to set up the statute of frauds. It was the defendant's own fault that the sale was not consummated." Holden *v.* Stark, 159 Mass., 503. And in another case heretofore cited, a lease having failed of consummation because of the party's misrepresentation of a material fact, the same court said: "Whether the covenant was insufficient under the statute of frauds is immaterial if the proposed tenant's omission to perform was not for that reason, but because of the defendant's own fault." Washburn *v.* Bradley, 169 Mass., 86, 88; see, also, McFarland *v.* Lillard, 2 Ind. App., 160, 164; Fitzpatrick *v.* Gilson, 176 Mass., 477.

As has been said heretofore, the plaintiff's duty under the contract was to find a purchaser, and not to enter into an enforcible contract with him.

The last question to be determined (other assignments of error having been practically abandoned on the argument) arises on the refusal of the court to give the defendant's fifth special instruction to the jury.

The refused instruction reads as follows:

"5. If the jury believe from the evidence that any *bona fide* purchaser was actually found by the plaintiff for 10,000 acres of said land as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge or coöperation of said plaintiff and at his suggestion sought to verify the truth of such statements and representations during the pendency of the negotia-

tions for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining, and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by interviews, conferences, or written communications, either personally or by attorney, or by others, with the president and first vice-president of the Southern Railway Company for the purpose of verifying the said statements and representations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in regard to the construction of said branch railroad, and ascertained from the said officers of the said railway company, from time to time, during such negotiations and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and the said Southern Railway Company to build such branch railroad, but that the subject of building such branch railroad had only been discussed, and that the building thereof depended on the development and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens, or furnishing the railroad with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which the said branch railroad would be constructed and of the non-existence of any agreement between the defendant and Southern Railway as alleged, then the defendant is not responsible for the non-appearance of the alleged sale or purchase of the land between the plaintiff and the alleged purchaser, and you should find for the defendant."

This instruction was refused, as we draw from the remarks of the court recited in the bill of exceptions, not for the reason that it did not embody a sound rule of law in the abstract, but because it had no foundation in the evidence. As said by the learned trial justice, the evidence had no tendency to show that the plaintiff did not fully rely upon the defendant's representation of the promise to construct the railway to the land. Assuming it to be true, as testified to by the defendant, that the plaintiff, while he was engaged in efforts to procure a purchaser, saw the letters that had been written to the former by the president of the Southern Railway Company, Mr. Spencer, still that correspondence did not inform him of the falsity of the representation upon which he acted. The letters do not contain a positive agreement to build the railway, but they do show that Mr. Spencer was deeply interested in the possible advantage to result from the development of defendant's lands, and was willing to build upon some certainty of immediate development of the coal mines.

Not only this, but during the time that plaintiff was engaged, he was informed by the defendant that the railway engineers were surveying the line, and had secured almost the entire right of way. The only uncertainty regarding the construction of the railway that

could reasonably be created in the mind of the plaintiff was in respect of the amount of development that the railway people would require as a condition. This is shown by the telegram of May 7, saying he would write to Spencer, and that the parties he was dealing with wanted to know positively about the railroad. It appears from the testimony, however, that he did not write to Spencer, and the latter testified that he received no such letter from the plaintiff. In reply to the telegram of May 3, the defendant wrote plaintiff on May 8, also quoted in the preliminary statement, in which he said that he had seen Spencer and that the latter was ready to build without any requirement as to development. On May 29 he wrote that the railway company had secured the right of way with a few exceptions, and that he had requested Mr. Spencer to call his men off until he could secure more land. On June 9 plaintiff mentioned the anxiety of Easter to know how soon the road could be built; that he had asked if he could have a talk with Mr. Spencer, and plaintiff had said yes. June 12 defendant answered this letter, saying that it would not be necessary for him to go with Easter to see Spencer, and that the latter would not hesitate to tell Easter that he would build at once. The tenor of defendant's entire correspondence up to the time that he received notice of the willingness of Easter to take 10,000 acres was to the effect that the road would be built at once. On August 25 plaintiff had brought the parties to agree to purchase, and telegraphed defendant to that effect. Plaintiff's letter of August 25 referred to his telegram and letter confirming the offer to purchase, and announced that the matter could be closed that week if Spencer should reply promptly to a letter written him by Judge Potter, who was one of the members of the Tri-State Coal and Coke Co. Plaintiff assented to the purchasers making inquiries of Spencer to satisfy themselves, and defendant, knowing it, concurred. Any other course on the part of either would have aroused the suspicion of purchasers. That they may have instituted inquiries could not affect plaintiff's right. It is true that Easter wrote to Mr. Spencer on August 23, asking him to give a definite idea as to when he could expect the railroad, as it would enable him to decide on taking the land. Mr. Spencer, it seems, went to Europe about that time, and the letter was answered by Vice-President Finley on the 29th, who said: "The construction of a line in the territory mentioned by you is under investigation and consideration, but no final conclusions have been reached. Conclusions in the matter would be greatly facilitated if we could be advised from time to time of actual developments which parties in control of lands contiguous to such a line would obligate themselves to undertake."

This letter was not from Mr. Spencer, to whom all the references had been made, and while it showed that no positive agreement was acknowledged, indicated nevertheless a disposition to carry on the enterprise. Before this was received, however, the purchasers made their proposal in the faith of the representations made, and there is nothing to indicate that they would not have performed if defendant had been able to satisfy them that his representation was true, or would be made good by Mr. Spencer. Besides, the plaintiff had

no knowledge of the letter. His work was done when he procured the offer, which there is nothing to show was in bad faith. What was thereafter done by plaintiff or any of the parties to secure the promise of railway construction in a fruitless attempt to consummate the sale could have no bearing on the rights of plaintiff which had accrued on or about August 25.

No error having been committed on the trial, the judgment will be affirmed with costs.

Affirmed.

TUESDAY, *May 1st, A. D.* 1906.

No. 1642. April Term 1906.

NAPOLEON B. DOTSON, Appellant,
vs.
WILLIAM A. MILLIKEN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE SHEPARD.

May 1, 1906.

TUESDAY, *May 8th, A. D.* 1906.

No. 1642.

NAPOLEON B. DOTSON, Appellant,
vs.
WILLIAM A. MILLIKEN.

On motion of Mr. C. L. Frailey, on behalf of counsel for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States, issue, and the bond for costs is fixed at the sum of three hundred dollars, and the bond to act as supersedeas is fixed at the sum of thirty-two thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Napoleon B. Dotson, appellant, and

William A. Milliken, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of May, in the year of our Lord one thousand nine hundred and six.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, Napoleon B. Dotson, as principal, and Henry M. Baker, as surety, are held and firmly bound unto William A. Milliken in the full and just sum of three hundred dollars to be paid to the said William A. Milliken or his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-first day of May, in the year of our Lord one thousand nine hundred and six. H. M. B.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Napoleon B. Dotson and William A. Milliken a judgment was rendered against the said Napoleon B. Dotson and the said Napoleon B. Dotson having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said William A. Milliken citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Napoleon B. Dotson shall prosecute said writ of error to effect, and

answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

N. B. DOTSON. [SEAL.]
HENRY M. BAKER. [SEAL.]

Sealed and delivered in the presence of—
W. J. SLATER.
GEO. C. HAZELTON.
T. A. MULLETT as to H. M. B.

Surety satisfactory.
J. J. DARLINGTON,
Att'y for Def't in Error.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

[Endorsed:] No. 1642. Napoleon B. Dotson, appellant, *vs.* William A. Milliken. Bond for costs on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed May 28, 1906. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To William A. Milliken, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Napoleon B. Dotson is plainitff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 28th day of May, in the year of our Lord one thousand nine hundred and Six.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted, May 28, 1906.
J. J. DARLINGTON,
Att'y for Def't in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 29, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 111 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Napoleon B. Dotson, Appellant, *vs.* William A. Milliken No. 1642, April Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 28th day of May A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,280. District of Columbia Court of Appeals. Term No. 48. Napoleon B. Dotson, plaintiff in error, *vs.* William A. Milliken. Filed June 7th, 1906. File No. 20,280.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 48.

NAPOLEON B. DOTSON, PLAINTIFF IN ERROR,

v.

WILLIAM A. MILLIKEN.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

William A. Milliken, the defendant in error, brought suit against Napoleon B. Dotson, the plaintiff in error, in the Supreme Court of the District of Columbia, to recover compensation for services as a broker, alleged to have been rendered in negotiations looking to a sale of 10,000 acres of coal lands in the State of Kentucky. In his declaration Milliken alleged that Dotson represented that he owned 124,000 acres of coal lands in Kentucky, and had obtained the agreement of the Southern Railway to construct a branch railway into those lands, and desired to secure a purchaser for either the whole or any considerable quantity thereof, at a price of $20 an acre; that he agreed to pay Milliken $2.50 for each

and every acre for which he should secure a purchaser; and that Milliken found a purchaser for 10,000 acres of the lands, but that the sale fell through because it turned out to be untrue that Dotson had obtained the consent of the railway company to construct the branch railway.

There was a trial of the case before a jury, which resulted in a verdict in Milliken's favor for the amount claimed, $25,000. From the judgment entered on this verdict Dotson appealed to the Court of Appeals of the District of Columbia, where the judgment was affirmed. (See the opinion of that court, delivered by Mr. Chief Justice Shepard, Record, p. 95.) Dotson then brought the case here by writ of error.

In the bill of exceptions in the case it is stated that it includes all the evidence (80).

The undisputed facts are as follows:

Early in the spring of 1902 Dotson, who then owned or controlled 124,000 acres of land in Harlan county, Kentucky, authorized Milliken to obtain a purchaser for the same, or a part of the same, or an interest therein, and agreed to compensate him for his services if he should produce such a purchaser. Soon afterwards Milliken undertook to interest some persons residing in Pittsburg in the lands in question, one of whom was Thomas J. Easter, the president of the Tri-State Coal and Coke Company. In the following summer agents of that company made two trips to the land. On the 24th of July, 1902, the Virginia Coke and Steam Coal Company, through Dotson as its president, gave to Easter, for 60 days, "an option to purchase 10,000 acres of land in Harlan county, Kentucky, at the price of $20 per acre" (20). On the 25th of August, Milliken wrote to Dotson that Easter had decided to take 10,000 acres on condition that Mr. Spencer, the president of the Southern Railway Company, should build the railroad to Harlan Court-House (45, 46); and that "they" had written to Spencer and stated what they proposed doing (44, 45).

On the 29th of August, Mr. Finley, the vice-president of the Southern Railway Company, answering a letter to Spencer from Easter of August 23, wrote to the latter that the construction of the branch railway in question was under consideration, but that no final conclusions had been reached (21). Thereupon Dotson was summoned to Pittsburg, where, on or about the 4th of September, he met Milliken and several representatives of the Tri-State Coal and Coke Company, including Easter. At that meeting the fact that Easter's letter to Spencer had been answered by Finley, as above stated, was concealed from Dotson (21). Just what took place at the interview at the Hotel Henry is in some respects a matter of dispute. The evidence relating thereto, so far as it is deemed necessary, will be referred to further on in this brief. During the months of September and October, 1902, efforts were made by all the parties concerned to get the Southern Railway Company to agree to build the branch railway (34, 53, 48); but these efforts failed, and no sale to Easter or the Tri-State Coal and Coke Company was ever consummated.

Upon these admitted facts, and upon evidence pro and con, to be hereinbelow more particularly referred to, it was claimed at the trial on behalf of Milliken that he had done all that his contract required him to do in the way of finding a purchaser and had earned his commission; and on the part of Dotson that Milliken had failed to do what under his contract and the law he was required to do to entitle him to any compensation from Dotson.

No exceptions were taken to the rulings of the court at the trial relating to the admissibility of evidence. The whole question here is whether the court erred in giving or refusing to give instructions to the jury as to the law governing the case.

Assignments of Error.

(1) The trial court erred in giving to the jury, over the objection and exception of the plaintiff in error, the following instruction (80):

> "If the jury believe from the evidence that the defendant, on or about the 30th day of April, 1902, represented to the plaintiff that he, the defendant, was desirous of securing a purchaser for either the whole or any considerable quantity of the Harlan County coal lands at the price of $20.00 per acre, that he had obtained from the Southern Railway Company its consent or agreement to construct a branch railroad into the said coal lands, and that he would pay to the plaintiff the sum of $2.50 for each and every acre for which he should find a purchaser at and for the price of $20.00 per acre, and that shortly thereafter, namely, on or about the 8th day of May, 1902, he further represented to the plaintiff that the Southern Railway Company was willing to build the said railroad into the said property without placing any requirements on the purchasers or holders of the said lands to put in any certain size of plants or number of coke ovens, and that the plaintiff, relying upon the said representations of the dedefendant, expended time and effort in the attempt to find a purchaser, and did find a purchaser able, ready and willing to purchase ten thousand acres of the said lands at the said price, provided the defendant's said representations were correct, and that the said sale failed because of the inaccuracy of the defendant's representations that the said railway company had so consented or agreed to construct a branch railroad into the said coal lands, then the plaintiff is entitled to recover the said stipulated sum of $2.50 per acre on the said ten thousand acres, or $25,000, in all."

And the Court of Appeals of the District of Columbia erred in holding that said instruction was correct.

(2) The trial court erred in refusing, over the objection and exception of the plaintiff in error, to give to the jury the following instruction (83):

"5. If the jury believe from the evidence that any *bona fide* purchaser was actually found by the plaintiff for 10,000 acres of said land, as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands, and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge or coöperation of said plaintiff and at his suggestion sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by interviews, conferences or written communications, either personally or by attorney, or by others, with the president and first vice-president of the Southern Railway Company for the purpose of verifying the said statements and representations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in regard to the construction of said branch railroad, and ascertained from the said officers of the said railway company, from time to time during said negotiations and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and said Southern Railway Company to build said branch roadroad, but that the subject of building such branch railroad had only been discussed, and that the building thereof depended on the developments and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens, or furnishing the rail-

road with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which said branch railroad would be constructed and of the non-existence of any agreement between the defendant and Southern Railway, as alleged, then the defendant is not responsible for the non-appearance of the alleged sale or purchase of the land between the plaintiff and the alleged purchaser, and you should find for the defendant."

And the Court of Appeals of the District of Columbia erred in holding that said instruction was properly refused.

ARGUMENT.

I.

The instruction which the trial court gave to the jury at the request of the counsel for the defendant in error (80) was erroneous in that it authorized the jury to find a verdict in Milliken's favor if he had found a person who was able and willing to purchase 10,000 acres out of a tract of 124,000 acres, without any agreement between the purchaser and the seller as to where, in the larger tract, the 10,000 acres were to be located.

This instruction, we maintain, would have been erroneous even if there had been evidence before the jury tending to show that the parties had agreed upon a particular tract or tracts including 10,000 acres, because it does not require the jury to find that fact as a condition precedent to a verdict for the plaintiff. But as a matter of fact there was not a particle of evidence in the case tending to show that either Milliken or Dotson had ever, even in his own mind, arrived at any conclusion in reference to what particular 10,000 acres out of the 124,000 acre tract was to be sold.

On the 2d of July, 1902, Easter wrote to Milliken stating that before proceeding further he should have "an option on the purchase of a tract of from 10,000 to 100,000 acres," the term of the option "to extend through sufficient time to map out a tract of land."

Milliken testified that the occasion of the writing of this letter by Easter was that while Easter was having the lands examined he learned that Dotson was about to sell 30,000 acres of the land to some people in Chicago (79).

On July 14 Milliken wrote to Dotson:

> "The parties here have made up their minds to take the entire balance of 100,000 acres of your lands. * * * And their engineer will go with me to go over the tract and locate the best points for opening the coal veins" (42).

On the 14th of August, Milliken wrote to Dotson that he felt quite certain his customers would take 10,000 acres, but that he would try to get them to make it 20,000 (44).

In a letter which Milliken wrote to Dotson on the 26th of September the writer informed Dotson that certain other customers with whom he was negotiating, and who lived in Chicago, were determined to have the 10,000 acres which they had selected out of the lands (47). On the 23d of October, Easter himself wrote to Dotson as follows:

> *"If you will mark on the map the coal you will sell,* regardless of the surface, excepting for operating purposes * * * we will then say whether or not we care to negotiate for the same" (19).

In replying to this letter on the following day, Dotson said to Easter:

> "Your favor of the 23d inst. is received. I will secure a map and mark location and price of lands or coal in different localities in Harlan county. * * * I will get map tomorrow, however, and mark location and price at which we can sell you lands or coal, and you can then let us know whether or not you care to buy it" (20).

As already stated, the negotiations terminated soon after this, and, so far as the evidence at the trial disclosed, the map referred to in Dotson's letter of October 24 was never sent, and certainly, if it was sent, no agreement was ever reached between Dotson and Easter or the Tri-State Coal and Coke Company as to the location of any part of the 10,000 acres which Easter had talked about buying.

In the opinion of the Court of Appeals (105) it is suggested that a contract to sell part of a tract of land "carries with it the right of reasonable selection by the vendee, and may therefore be rendered sufficiently certain;" and in support of this proposition Mr. Chief Justice Shepard cites seven cases. In none of the cases cited, however, was the right of the vendee under such a contract to reasonable selection sustained.

In the first case, Wofford *v.* McKenna, 23 Tex., 36, 46, a tax-sale deed was held to be void because it purported to convey a part of a tract of land and did not contain any proper description of such part. In passing, the court says that in case of a *deed* between individuals purporting to convey an undescribed part of a tract of land, the vendee would have the right of selection, because the conveyance would have to be held to pass some interest, and would be construed most strongly against the vendor. The court cites no authority in support of this *obiter dictum*.

In the next case, Cheney *v.* Cook, 7 Wis., 413, 422, there was a contract which expressly provided that the purchasers were to have the right within a certain time to determine how much, if any, and what part of the lands they would take. No question was raised or discussed as to any right of reasonable selection.

In Walsh *v.* Ringer, 2 Ohio, 327, 333, there was no question of selection suggested or considered, the court merely holding that a certain description carried a certain definite tract of land.

In Brown *v.* Menger, 42 Minn.. 482, the court held that under the language of the agreement in that case the purchaser was bound to take the prescribed quantity and kind of lands selected by the vendor.

In Armstrong *v.* Mudd, 10 B. Mon., 144, the deed gave metes and bounds, and it was simply held that the grantee could make the description certain by "giving form and locality" to the tract described. There was no question of reasonable selection raised or considered.

In Lingerman *v.* Shirk, 15 Ind. App., 432, 437, the contract involved was for an exchange of lands, and it was expressly provided that one of the parties should convey so many acres of his land in a certain locality, the other party to have the right of selection of that quantity from the whole tract. The court said:

> "Although the lands are not specifically described, there is a definite mode of ascertaining them *prescribed in the contract,* and thus that which would otherwise be uncertain may be made certain."

In Lander *v.* Peoria, &c., Ass'n, 71 Ill. App., 475, 481, the contract under consideration provided for the sale of a lot in a certain subdivision—"said lot * * * to be designated by a majority of the persons comprising the Citizens' Committee on Fair Grounds." This was held to be sufficiently certain, the court observing that all the lots were of the same value.

We have now considered all the cases relied upon by the Court of Appeals. There are other cases in which the same question has arisen.

In Nippolt *v.* Kammon, 39 Minn., 372, the contract was for the sale of "five acres, lot 3, sec. 23, town 28, range 23." This was held to be void because what five acres were intended was not stated, and it was even held that the description could not be helped out by proof of the vendor's ownership of a particular five-acre tract.

In Brockway *v.* Frost, 40 Minn., 155, it was held that an agreement for the conveyance of a designated number of acres included in a larger tract was void because of the uncertainty of the description.

In Monk *v.* Parker, 180 Mass., 246, a broker had been authorized to find a purchaser for 290,000 feet of land, to be taken from a tract containing 500,000 feet—"said 290,000 feet to be divided as to front and back lands from the whole parcel as nearly equal as possible." The case was an action by the broker for his commissions in finding a purchaser. It was claimed that there was no meeting of minds of the owner and purchaser as to the land to be conveyed. The court held otherwise, but only because it appeared that the owners accepted as satisfactory a proposition by the purchasers that the owners should make the selection in accordance with the above restrictions.

> "Where any of the facts required to determine the location or quantity of land require the concurrence of both the parties in order to be settled, the court will not decree specific performance" (1st Story's Eq. Jur., sec. 793).

No doubt it will be claimed here, as in the Court of Appeals, that this objection to the instruction which the court gave to the jury at the plaintiff's request was not made at the trial.

It is conceded that where an instruction given to a jury contains several distinct propositions of law, a general exception to the instruction will not be sustained if any one of the propositions is correct. The instruction now complained of contains only a single proposition. By it the jury were told that if they found certain things to be established by the evidence, a verdict in favor of the plaintiff for $25,000 followed as a matter of law. The record shows that this instruction was given "over the objection of counsel for defendant," and that an exception was duly taken

to the overruling of the objection (80). The record does not show what reason or reasons were urged in support of the objection, and if the contention of opposing counsel here as to the reason now under consideration for the objection not being shown by the record to have been stated at the trial is valid, it would be equally valid to any other reason that can be suggested for the objection. All that the record discloses is that the instruction was objected to, and that the objection was overruled. Of course, if the record stated that any particular reason was given in support of the objection it would be argued here that it was too late to suggest any other reason for it. In short, if it is required in such cases that the record must show the reason given for the objection, then no ground for the objection can be relied on here, because none is disclosed by the record.

It is respectfully submitted that where a single proposition of law is given to a jury, either at the request of counsel or in the charge of the court, and an exception is allowed to the giving of such instruction, or to such part of the charge, it is not necessary that the grounds of objection to the instruction or part of charge should be stated in the bill of exceptions unless the objection be one which goes to the form of the instruction only. If the proposition of law contained in the instruction be fundamentally erroneous, a general objection is all that is required. It is settled law that a general objection to a question asked a witness at a trial is good if the question calls for an answer which is inadmissible under any view of the case. If the objection be that the question is leading, or that some necessary preliminary fact has not been proved, a general objection would not be sustained on appeal, because if the point had been explicitly made at the trial, the court might have caused the form of the question to be changed or the preliminary fact to be first proved. But if a question is wholly illegal or an instruction fundamentally wrong, it is not required on appeal

that the record should show what *reasons* were urged at the trial in support of the objection.

It probably seldom happens in practice that arguments are not advanced by both sides in the appellate tribunal which did not occur to counsel at the trial.

In Watts *v.* Waddle, 6 Peters, 402, which was a suit in equity, this court held that the complainant in the case was entitled to certain rents. In meeting the objection that the complainant had not claimed these rents in the court below, this court said:

> "There is no rule of court nor principle of law which prevents the complainant from assuming a ground in this court which was not suggested in the court below; but such course may be productive of some inconvenience and of much expense."

It has twice been held by this court that for a plain fundamental error a conviction in a criminal case will be reversed, although the objection was not made at all at the trial (Wiborg *v.* U. S., 163 U. S., 658; Clyatt *v.* U. S., 197 U. S., 207).

In Ward *v.* Cochran, 150 U. S., 597-604, it was held that it was enough if the bill of exceptions "specifies with distinctness the parts of the charge excepted to, and the legal propositions to which exceptions are taken."

In Noonan *v.* Caledonian Mining Co., 121 U. S., 393-400, it was held that a general objection to evidence which is immaterial, irrelevant, and incompetent is unavailing on appeal "unless it be of such a character that it could not have been obviated at the trial."

In Felton *v.* Newport, Receiver, 34 C. C. A., 470—a case which was heard by Taft, Lurton and Severens, JJ.—the distinction between general exceptions that may or may not be relied upon on appeal is clearly made. Several exceptions were held to be so general that the court could not consider them. But on another objection the judgment for the plaintiff was reversed. That was an objection to the part of the

charge which instructed the jury what constitutes negligence in running a train. There is nothing in the case as reported to indicate what was the particular objection to the part of the charge in question that was made at the trial, but it was held that the instruction was bad because it applied only rules governing the running of trains in incorporated towns, whereas, on the evidence in the case, it was a matter of dispute whether the accident occurred in the town or beyond its limits.

In Gilbert *v.* Fay, 4 App. D. C., 38, an objection to a question and answer was held good and a verdict for the plaintiff was reversed, although the bill of exceptions stated no reason for the objection, and this on the ground that, as the evidence was incompetent in any view of the case, the plaintiff could not have obviated the objection. To the same effect is Washington Gaslight Company *v.* Poore, 3 App. D. C., 134.

Where no objection was made at the trial on account of the non-joinder of necessary parties, or as to the right of the complainant to sue, it was held that those objections might be made for the first time in the appellate court, and that that court had the power, and perhaps the duty, of reversing the decree below for that reason (Roberts *v.* Bradfield, 12 App. D. C., 453).

In Capital Traction Company *v.* Holtzman, App. D. C., 125, it was again said that an objection to a question is sometimes good without any specific reasons for the objection.

In Smith *v.* Barstow, 2 Doug. (Mich.), 155, where an exception was taken to the refusal of the trial court to give an instruction, it was held that the party asking the instruction was not to be confined on appeal to the reasons given for the objection at the trial.

And in Wallace *v.* French, 24 Mich., 255-262, it was held that an objection made in the appellate court by the defendant in error to exceptions relied upon by the plaintiff in error, that they were too general, should be overruled because the bill of exceptions was agreed upon by the attorneys

of the respective parties, and it did not appear that any claim was made that the objections were too general to be incorporated in the record.

Rockefeller *v.* Donnelly, 8 Cowen, 661, was an action on a bond to indemnify a town concerning a bastard child. In the Court of Errors and Appeals of New York it was objected that a point relied upon there had not been made in the court below. In a separate opinion, replying to this objection, Senator Jordan said:

> "It is undoubtedly a salutary rule, as adopted by this court, that where a party litigating a suit in a court of original jurisdiction purposely or negligently omits to present any point to the consideration of the court, or where, if presented there, it might be obviated by proof or amendment, he shall not be allowed to draw that point in question in the court of appellate jurisdiction (13 John., 576; 18 John., 558; 2 Cowen, 49).
>
> "But where a cause is seriously contested in the court below, and the counsel put forth their powers in good faith upon the matters in issue generally, it appears to me to be taxing the human intellect too severely to require it, upon the first argument, to grasp the whole subject, and seize upon every point of argument embraced by the case, however abstruse or complicated, at the peril of a sacrifice of acknowledged rights, when the cause comes to be reviewed in the court of dernier resort."

In Bohm *v.* Metropolitan Elevated Railway Company, 129 N. Y., 584, the Court of Appeals of New York distinguished between rulings as to mere matters of evidence and those relating to fundamental questions of law governing the case, and held that exceptions taken below would be considered as bringing up for determination the true rule as to the measure of damages, although the record did not clearly show that that question was raised in the lower court.

In another case in the same State the jury were instructed that if certain facts were proved the plaintiff was entitled

to a verdict. The instruction was objected to at the trial on the ground that there was no evidence to entitle the plaintiff to go to the jury. It was held on appeal that under this objection the defendant could rely upon the statute of limitations, although the record did not show that the attention of the trial court was called to that specific claim (Mahoney *v.* Clark, 1 App. Div., 196).

On a general exception by a defendant to an instruction as to the "law of the road"—whether a foot passenger should have gone to the right or the left—it was held that the exception could be considered as relating both to the correctness of the statement of the law and also as to its applicability to the issues in that particular case, the record showing only that the instruction was objected to generally (Savage *v.* Gerstner, 36 App. Div., 220).

If an objection taken at the trial comprehends the question argued on appeal, that is sufficient when it does not appear that that question was *not* considered at the trial (Pratt, admsx., *v.* Trustees, etc., 93 Ill., 475; Glover *v.* Shute, 26 La. Ann., 350).

> "We will not consider points not made in the courts below and in this court; but this rule does not extend to the *reason* upon which the points may be sustained."

Accordingly, the court reversed a judgment for the plaintiff for reasons which were not urged by the counsel for the successful party, either in the trial court or in the appellate court (Bond *v.* Railway Company, 67 Iowa, 712).

In an action in Colorado for negligence against an employer by an employee, the trial court, in a special instruction giving the law as to the liability of an employer, omitted (by inadvertence, apparently) the word "not," giving the exact opposite of the proper instruction. The Supreme Court of the State at first held that this objection could not be taken advantage of on appeal, under a general objection. But on a rehearing it reversed the judgment for that error, saying:

"The only remaining question we shall determine relates to an instruction given by the court, which reads as follows:

" 'The jury is instructed that the rule which obtains in the State of Colorado is, that for the acts of the vice-president done within the scope of his employment, and such as properly devolved upon the master in his general duty to his servants, the master is liable; while for all such acts as relate to the common employment which are on a level with the acts of the fellow-laborer, except such acts as are done by the vice-principal against the reasonable objection of the injured servant, the master is responsible. In other words, the test of the liability is the character of the act, rather than the relative rank of the servant.'

"To this instruction an exception was noted as follows:

" 'Defendant then and there, and at the time, duly excepted to the court's giving the foregoing instruction to the jury, and to the giving of each paragraph thereof.'

"There is no question but what the instruction above quoted is erroneous, in that it omits the word 'not' before the word 'responsible.' In the original opinion it was thought that the exception to this instruction was insufficient to raise the question of the incorrectness of the instruction on account of the omission of the word 'not,' mainly because it might be said that the omission was an inadvertence. Upon further reflection, we are satisfied that the views then expressed on this subject are incorrect. Exceptions of the import of that taken to this instruction have been recognized by an unbroken line of decisions of this court to be sufficient. The distinction between an exception which goes to an entire charge, and one which is directed to a specific instruction, must not be lost sight of. If the exceptions to instructions are so taken that they direct the attention of the court specifically to the proposition of law challenged, then the correctness of the instruction thus pointed out may be determined. In other words, the office of an exception is to point out specifically the proposi-

tion of law in the instruction which, it is claimed, is incorrect. It is for this reason that in numerous cases it has been held, that where an exception or exceptions were only directed to an entire charge, a part of which is correct, they are insufficient, because they fail to specifically point out that part of the charge which, it is claimed, is incorrect. Such, however, is not the case with this instruction. It contained, on the whole, but one distinct proposition of law which is not correctly stated. It has never been held by this court that the reasons why an instruction is incorrect must appear in the exception thereto. Therefore, because the exception fails to note the omission of the word 'not' as the basis of the exception is immaterial. True, as argued, the omission of this word is all that can be successfully urged against the instruction, but that renders it as radically wrong on the proposition of law attempted to be stated as it is possible to express it. Correctly stated, it would present the very essence of the law controlling this case; incorrectly stated, it was fatally misleading, to the prejudice of defendant. The jury was bound to take the law as stated by the court. It would have no right to supply a word which would result in declaring the law exactly the opposite of that stated in the instruction as given. Hence it cannot be said that the omission was a mere clerical misprison, or inadvertence of that character that the jury, in examining the instruction, would detect the mistake and supply the omitted word, or would have the right to do so. Nor can we say, in this instance, the error is so patent that it will be presumed the attention of the trial court was not called to it. We must presume that counsel direct the attention of the court to the alleged errors in an instruction to which an exception is taken, and we cannot establish a rule of practice which would measure the sufficiency of an exception by the test of whether the error to which it is directed is manifest or not. Such a regulation would require this court to exercise an arbitrary judgment in passing upon instructions to which exceptions have been preserved without a guide which would serve as a uniform rule."

3

An excellent illustration of the rule we are contending for in this regard is seen in cases in which at the close of the evidence in a trial the defendant moves the court to instruct the jury to find a verdict in his favor. It is believed that of the numerous cases which have come to this court on exception to the refusal to grant such a motion in very few has the record shown what reasons were urged in its support.

II.

The instruction in question was erroneous for the further reason that it did not require that the jury should find that the purchaser was willing to buy on terms satisfactory to Dotson, or to find that the vendor and the purchaser had agreed on terms.

It will be seen that the instruction under consideration directed a verdict for the plaintiff if the jury should believe from the evidence that he had found a purchaser "able, ready and willing to purchase 10,000 acres of the said lands at the said price, provided the defendant's said representations were correct," and that the sale failed because of Dotson's misrepresentations in reference to the railway company building a branch road.

In effect, the jury were told by this instruction that if Milliken had found a purchaser who was willing to pay the $20 per acre for 10,000 acres out of the 124,000, he was entitled to his commission if at that stage of the negotiations the proposed purchaser declined to proceed further, because the railway company would not at once build the branch railway. It is believed that the authorities are unanimous that in order to entitle the broker to his commission where it is claimed that the sale is prevented by the fault of the vendor, it is essential that the broker should prove that he found a purchaser who was willing to purchase *on the vendor's terms.* The price to be paid is but one of several terms

in the sale of real estate. Whether the purchase-money is to be paid in cash, or part in cash and part in deferred payments, and how soon the transaction is to be closed, are just as necessary factors in a binding contract in the sale of real estate as the price itself.

In McGavock *v.* Woodlief, 20 Howard, 221, the law on this subject is thus stated:

> "The broker must complete the sale; that is, he must find a purchaser in a situation ready and willing to complete the purchase on the terms agreed on."

The foregoing quotation from McGavock *v.* Woodlief was made and approved in a subsequent case in this court, in which it was held that the broker could not recover when his principal died pending negotiations and the representatives of the latter completed the negotiations begun by the broker (Crowe *v.* Trickey, 204 U. S., 228).

In a case before the Circuit Court of Appeals for the Second Circuit, decided by Brown, circuit justice, and Lacombe and Shipman, circuit judges, it was held that a broker who had found a person who entered into a contract to purchase, but who did not in fact buy the land concerned, was not entitled to his commission because he had neither effected a completed sale nor an agreement of purchase susceptible of enforcement (Hammond *v.* Crawford, 66 Fed., 427).

A vendor and purchaser entered into a parol agreement of sale. The purchaser was an executor. In an action by the broker who brought about the agreement of sale, for his commission, it was held that he was not entitled to recover, because there was no valid contract of sale which the vendor could enforce, because, in the first place, the purchaser could have set up the statute of frauds as a defense, and, in the second place, it was not shown that as executor he had a right to enter into the contract. In that case the purchaser set up a supposed defect in the title, whereupon the vendor canceled the contract. The court says that it takes the mid-

dle ground between the cases which hold that the broker must show an actual consummated purchase unless prevented by the vendor and those which hold the commission earned when the minds of the vendor and the purchaser have met in a parol agreement. It was held that the true rule is that the broker is entitled to his commission when a *valid* contract is signed (Wilson *v.* Mason, 158 Ill., 304).

In a very recent case in the Court of Appeals for the First District of California it was held that a broker is not entitled to his commission until he procures a valid contract of purchase or brings the buyer and seller to an agreement, the court observing that a person might be ready, able, and willing to purchase and yet make no agreement to purchase (Southwestern Packing Company *v.* Whitney, 89 Pac. Rep., 981).

The different views as to the right of the broker to a commission when his principal and the prospective purchaser have entered into a valid contract of sale, which the purchaser fails to perform and the owner declines to enforce, are set forth with much force and clearness in a Tennessee case, in which three out of five judges held that the broker could recover and the two other judges delivered a vigorous dissenting opinion (Parker *v.* Walker, 86 Tenn. (2 Pickle), 566).

This brings us to a consideration of the evidence in the present case, which, as we contend, not only fails to show that Easter, or the Tri-State Coal and Coke Company, was willing to enter into a contract of purchase upon terms satisfactory to Dotson, but goes much further than is required by the authorities above referred to, because it affirmatively discloses that no such meeting of the minds of the parties was ever reached.

We presume it will not be contended that the option agreement of July 24 (20) was an agreement of purchase. Nothing was paid for the option and it simply purports to give

Easter the privilege of buying in 60 days should he choose to do so.

On the 24th day of April, 1902, Dotson wrote to Milliken, as follows:

> "I am just in receipt of a letter from Mr. Franklin Waterman, of your city, requesting me to send you description of our coal lands, which I herewith enclose, together with a circular letter which will explain to you what we want to do with the property. We have arranged with the two railroad companies to build a branch into it and develop the lands. We want to find a good responsible party *who will take or purchase one-half interest* in the property at the rate of $17.50 per acre for the property, *and develop it jointly with us*" (22-3).

Replying to this letter the next day (April 25) Milliken wrote to Dotson as follows:

> "I understand from Mr. Waterman that you desired to sell the property outright. I had submitted the matter to some coal people in my office this morning from Pittsburg and have arranged to meet them Monday in Pittsburg. Since receiving your letter I see that you simply wish to sell a half interest in the property with the understanding that the purchasers are to join with you in the development of the property" (36).

In a letter dated May 7, from Milliken to Dotson, the former said:

> *"I am working it on the basis of their taking 55 per cent. of the capital stock at par, and you 45 per cent."* (37).

On the next day (May 8) Milliken again writes to Dotson, saying that he is working with the Tri-State Coal and Coke Company "to see how many of their immediate friends will join in with them and raise the necessary capital to buy and develop the property. Their opinion is, to first send their

own expert to examine the property; if he reports favorably as to the coal, *to then form a company of* 2½ *millions, you to take* 45 *per cent. of the stock and they* 55 *per cent. at par*" (38).

And on August 14 following, Milliken informed Dotson that he felt quite certain the Tri-State Coal people would take the 10,000 acres, and he added, "but I shall try to get them to make it 20,000, and let you take 49 per cent. in stock of their company" (44).

In his letter to Dotson of August 25, Milliken said to Dotson [italics his]:

> "I have met Mr. Easter, and they have decided to take the 10,000 acres of coal lands on condition that Mr. Spencer will assure them as to the building of the railroad to Harlan C. H. They have written to Spencer and stated what they proposed doing, and asked as to the railroad. So if his answer confirms what you have represented on this point, they will close the purchase for 10,000 acres.
>
> "Now comes a point that brings the matter *up to you*. Mr. Easter has letters from *two* different parties offering *this land* to him at $12.50 per acre and at $15.00. Each party claims to represent the owners, and each has sent him a copy of my analysis of the coal and coke made by Dr. Otto Wuth, *leaving off my name*, of course. Mr. Easter of course wishes to buy the land as low as possible and will consequently try to deal *through* the party offering him the land at $12.50. This I cannot prevent, of course, but I have assured him that no one could sell the land under $20.00 and that I had your word to that effect. * * * They have made up their minds to buy the 10,000 acres at $20.00 if they cannot get it for *less*, if Mr. Spencer satisfies them he will build the road. If he does not, they do not want the land at *any price*.
>
> "It is a great pity you cannot *stop* these parties from offering these lands at such prices. It only makes it more difficult to negotiate a sale with responsible people" (45).

In another letter, written later on the same day (August 25), Milliken says to Dotson:

> "I expect to return with Mr. Wilson to close up his purchase this week, if Spencer replies promptly to Judge Potter's letter, as I suppose he will do" (46).

As late as November 1, Milliken wrote to Dotson:

> "The dicker Easter is trying to make on price cuts no figure if Spencer will take up the question and write a letter saying he will build the road at once" (48).

It will thus be seen that, so far as the evidence at the trial discloses, up to the time the negotiations were broken off in consequence, as claimed by Milliken, of the failure of Dotson to get the Southern Railway Company to build the branch railway, no agreement had been reached as to the price to be paid for the 10,000 acres if Easter or the Tri-State Coal and Coke Company should buy it.

There is nowhere in the evidence a suggestion that the matter of when the purchase-money should be paid was discussed at all. All that was claimed at the trial on behalf of Milliken was that when the parties met at the Hotel Henry, in Pittsburg, on or about September 4, Dotson was informed that Easter, or the corporation he represented, would buy 10,000 acres of the land *if* Dotson could produce or obtain a written agreement, signed by the railway company, agreeing to build the branch road. As that was an obstacle to the further progress of the negotiations which was not removed, the parties never discussed even whether the land should be paid for in money or in stock, or whether there should be any, and if so what, deferred payments, or when the sale should be closed, or what title was to be given, or, if a good title, how the purchasers were to be protected against possible defects in the title. It does not even appear whether the title was in Dotson at all. Easter accepted an option given by a corporation by Dotson as its president (20).

It therefore appears from the admitted facts in the case that, aside from the question of the building of the branch railroad, no contract of purchase between Dotson, on the one hand, and Easter, or the Tri-State Coal and Coke Company, on the other hand, was ever reached, in writing or by parol, because (1) no particular tract of land was agreed upon; (2) the price to be paid was never agreed upon; (3) when the purchase-money was to be paid was never even talked about; (4) it was undetermined whether the price was to be paid in cash or part cash and part in deferred payments; (5) if there were to be deferred payments, nothing was said about how they were to be secured; and (6) it was even undetermined whether money was to be paid or Dotson was to take in whole or in part payment shares of stock in the Tri-State Coal and Coke Company, or some other corporation to be formed to develop the land after it should be purchased. With all these terms of sale either not considered at all or discussed and left undetermined, the court, by the instruction complained of, told the jury in effect to give the plaintiff a verdict for $25,000 if the prospective purchaser was ready, able, and willing to buy and the negotiations were interrupted by the failure of Dotson to establish the truth of his alleged representation about the railroad. It is submitted that this was plain error.

III.

The court erred in giving the instruction in question for the additional reason that the condition upon which Easter proposed to buy ten thousand acres of the land was not that the purchaser should be satisfied that the representations made by Dotson as to the statements or promises made by Spencer to him were true, but upon the entirely different condition that Dotson should obtain from the Southern Railway Company a binding contract to build the branch railway.

It appears all through the evidence that Easter offered to buy the ten thousand acres if the Southern Railway Company would agree to build the branch railway. Thus, in the letter which is relied upon by counsel here, and was relied upon by the Court of Appeals, as fixing the date of the agreement to purchase—Milliken's letter to Dotson of August 25 (45)—Milliken wrote: "I have met Mr. Easter, and they have decided to take the ten thousand acres of coal land *on condition that Mr. Spencer will assure them as to the building of the railroad to Harlan C. H. * * * They have made up their minds to buy * * * if Mr. Spencer satisfies them that he will build the road.*"

It might well have been that Mr. Spencer did tell Dotson in April or May that the Southern Railway Company would build the branch railway without any conditions; and yet, in August or September, he might have forgotten that he had made that promise, and whether he remembered it or not, he might have changed his mind. It is idle to suppose that Easter would have purchased the land if satisfied that Spencer had originally made such a statement, if he was not willing to stand by it at the time Easter should purchase. It clearly appears that what Easter demanded was not a mere assurance of any kind that Spencer had promised that

the branch railroad would be built, but a hard and fast contract with the president of the Southern Railway Company to build it.

This being so, it is clear that Milliken never found a purchaser, and that he is, therefore, not entitled to a commission in any view of the case. It was clearly erroneous for the court to say to the jury, as it did by the instruction in question, that they should render a verdict for the defendant if they found that the purchaser agreed to buy *"provided the defendant's representations were correct."* The condition that Easter imposed was not that Spencer had *said* he would build the branch road, but that he would build it.

In Crockett *v.* Grayson, 98 Va., 354, Crockett, the owner of improved real estate, employed a broker to sell it, informing him that $4,000 would satisfy the liens upon the property. This statement turned out to be untrue. The broker procured a purchaser named Spiller, who by a contract in writing agreed to buy the property at the price fixed by the owner, and to assume and pay as a part of the purchase-money "the sum of $4,000, which the said Grayson represents as being the whole amount of the liens against the said property. * * * But, if the amount of liens, by a judgment or otherwise, against the said Grayson exceeds the sum of $4,000, then the said Spiller is at liberty to declare this agreement null and void."

When Spiller came to have the title examined, he found that the liens in fact amounted to more than $40,000. He thereupon declined to buy. The broker then sued for his commission. The Supreme Court of Virginia held he was not entitled to recover, saying:

> "A real estate broker, to be entitled to compensation, must complete the sale. He must find a purchaser in a situation ready and willing to complete the purchase upon the terms agreed upon before he is entitled to his commissions. When he has found such a purchaser who has entered into a valid contract, his right to compensation cannot be defeated

by the fault of the seller, his misrepresentation, or by his whimsical or unreasonable refusal to comply with his contract (McGavock *v.* Woodlief, 20 How., 221; Kock *v.* Emmerling, 22 How., 69; Tombs *v.* Alexander, 101 Mass., 255, and Mechem on Agency, sec. 862 *et seq.*

"It is claimed in this case that Crockett found a purchaser who entered into a contract in exact accordance with instructions which he received from his principal, Charles Grayson; and in one view of it, this is true. Grayson was ready to sell his property for $14,000, and Spiller was able to pay for it. The terms of payment were agreed upon, and a contract signed; but, as we have seen, in that contract there was a right reserved by which it was subsequently defeated. The contention of Crockett upon this point is that it was defeated by the misrepresentation of Grayson, and that therefore he is entitled to the compensation for which he had contracted.

"There are, perhaps, cases in which a broker may be entitled to compensation where a negotiation for the sale of real estate has been broken off by reason of a misrepresentation made by the seller. Such a case is referred to in Mechem on Agency, but the authority is not accessible to us. It is a fundamental principle that the fraud of which one complains must be accompanied by damage to constitute a cause of action. It is true, that Grayson represented that $4,000 would satisfy the liens upon his lands, and this statement appears to have been untrue: but it is plain that, so far as it affects Crockett's right to recover in this action, it did not injure him in the least degree, for if the representation had not been made, Spiller would never have entered into the agreement. Had Grayson disclosed the precise state of the record with respect to the liens upon his property, it is safe to say that the negotiation between himself and Spiller would at once have ended."

In Curtiss *v.* Mott, 90 Hun., 439, it appeared that the broker who brought the suit to recover a commission from the defendant had been told by his principal when he was

employed that the monthly rentals of the property to be sold amounted to $510. This representation was communicated to the proposed purchaser, who agreed to buy. It was then found that the monthly rentals were only $488, and because of that fact alone the purchaser refused to complete his purchase. The judgment of the trial court in favor of the plaintiff was reversed, the court saying that in order to earn his commission it is necessary for the broker to produce a purchaser ready and willing to buy the property upon the seller's terms; that this the broker had not done, but instead had "brought a man who would have bought it at the seller's terms, provided the monthly rentals at the time had been equal to those represented to him by the broker. Now if the broker had obtained the information as to the amount of the rentals from any other source than that of the intended vendor, it would not be pretended that he could recover commissions."

The court suggested, but did not decide, that it was a question whether the plaintiff in that case in a proper action could recover damages from the defendant "because of misrepresentations which prevented performance of his contract."

In French *v.* Brush-Swan Electric Light Company, 39 N. Y. State Rep., 515, a case which was decided in 1891, in the general term, first department, of the New York Supreme Court, Van Brunt, P. J., in delivering the unanimous opinion of the court, said:

> "It is claimed that the plaintiff having been employed by the defendant to effect a sale of the rights mentioned in the complaint, and having produced to his principal a customer who was at all times able ready and willing to purchase for the price and upon the terms fixed by and satisfactory to the principal, is entitled to recover his commission. If this proposition were borne out by the facts established by the evidence, undoubtedly the plaintiff might recover. But upon an examination of the case it will be seen that there is one important element assumed in this proposition which is not established by the evidence.

"The defendants were the owners of certain electric light processes or appliances, the exclusive right to use which they were desirous of selling, and they addressed a letter to the plaintiff by which he was authorized to sell the exclusive right to use these appliances in a certain territory for the sum of $150,000. It appeared that subsequent to this time the plaintiff procured certain parties to enter into a conditional contract, whereby the parties produced should have the option to purchase these rights for $150,000 after it had been clearly demonstrated by actual experience that the process would do that which it was represented to do. The battery employed failing to come up to the representations was the sole cause of the non-completion of the sale, the parties produced by the plaintiff refusing to complete the purchase upon that ground.

"The contract of the defendants with the plaintiff was, that he was to effect a sale of these rights, and, in order to entitle himself to compensation as for a fulfillment of the contract, he was bound to produce some person ready and willing and able to purchase. This the plaintiff has not done. All that he produced were parties willing to purchase conditionally, and the condition not being fulfilled, they were not willing to purchase.

"In the employment of the plaintiff there was no guaranty as to the sufficiency of these appliances. He was simply to sell the right to use them. He did not sell, and it is immaterial what may be the cause. This right to compensation was not established till he effected a sale.

"The question as to the failure of the battery to work, which was the cause of the refusal of the parties to purchase, was entirely immaterial. In the contract of employment, as already stated, there was no guaranty by the defendants that the battery would work. The circular to agents issued by the defendants, which contained a description of these machines, in no wise altered the question. It was a representation by the defendants, it is true, of what they claimed their machines would do; but a person accepting a commission to sell these machines, was

not guaranteed, by reason of this circular, that the machines would do that which the circular represented. Consequently the failure of the proposed purchaser to take because not satisfied with the machines put an end to any claim for commissions which the producer of the proposed purchaser might attempt to establish."

IV.

The instruction under consideration was improperly granted, for the additional reason that it left to the jury the question of whether the prospective purchaser was able to purchase 10,000 *acres of land at* $20 *an acre.*

As already stated, the bill of exceptions shows that it contains all the evidence given in the case (80). The record may be scrutinized from end to end without discovering a particle of evidence tending in any degree to show that either Easter or the Tri-State Coal and Coke Company was able, either in September, 1902, or at any other date, to pay $200,000. The Court of Appeals met this objection by holding, first, as matter of fact, that the evidence showed that Dotson had accepted the purchaser without condition or inquiry, and, second, as matter of law, that in such a case the purchaser is presumed to have been able to pay the purchase-money, and the burden of proof is upon the defendant to show the contrary. On this point the Court of Appeals cites three cases—Davis *v.* Morgan, 96 Ga., 578-520; Lockwood *v.* Halsey, 41 Kan., 166-169, and Fairly *v.* Wappoo Mills, 44 S. C., 227-248.

In the case in 96th Georgia the broker introduced the proposed purchaser to his principal, and the purchaser stated that he was ready and willing to pay certain cash and give certain notes secured by mortgage on the land, these being the terms upon which the broker had been authorized to effect the sale. But the vendor refused to sell the land on

those terms and would not let the purchaser have it. In its opinion the court says:

> "In the present case, according to the defendant's own evidence, he accepted the proposed purchaser without objection, recognizing him as answering all the requirements; and there is no suggestion that he was not entirely solvent. Indeed, it appears that the failure to complete the sale was due wholly to the defendant's inability to make a good title to the land. This being so, we think the court erred in making the plaintiff's right to recover depend on whether he had established the ability of the purchaser to pay for the land."

In its opinion in this case, the Supreme Court of Georgia states that the authorities on the question of the presumption of the ability of the purchaser when he has been accepted by the vendor is conflicting, and it says that the true rule is this:

> "As a general proposition, a broker who has been employed to sell is not entitled to recover his commission unless he shows that he procured a person willing, ready, and able to purchase upon the terms prescribed by his principal; but where it appears that the proposed purchaser was accepted by the principal, the burden is upon the latter to show that the purchaser was not able to comply with the contract."

In the case in 44th South Carolina, cited by the Court of Appeals, the owner of certain fertilizers which the broker, who was plaintiff in that case, found a purchaser for, entered into a formal contract of sale with the purchaser so produced by the broker.

The court said:

> "In addition to this, while it may be true, as a general proposition, that a broker, before he is entitled to his commissions, must produce a purchaser willing and able to comply with the terms of the contract of sale, yet if the purchaser produced by the

broker is accepted by the seller, without any misrepresentation on the part of the broker as to the financial ability of the proposed purchaser, and without the suppression by the broker of any knowledge he may have as to the financial condition of such purchaser, then the burden of proof is upon the seller to show that the proposed purchaser is not able to comply with the terms of the contract. It seems to us, after a careful examination of the cases cited upon this point, some of which we will notice below, that the true rule upon this subject is well stated in Coleman *vs.* Meade, 13 Bush (Ky.), 358, as follows: 'The broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented, the employer is not bound to accept him or to pay the commission, unless he [the purchaser] is ready and able to perform the contract on his part, according to the terms proposed; but if the principal accepts him, either upon the terms previously proposed or upon modifications then agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned.' But if, as was the case in McGavock *vs.* Woodlief (20 How., 221), the principal rejects the purchaser, and the broker claims his commission, he must show not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser—by which we understand, was a person able to carry out the contract, and such as the principal was bound, as between himself and the broker, to accept."

In the case in 41st Kansas cited by the Court of Appeals a suit was brought by the vendor to recover from the broker commissions paid him for effecting an exchange of lands. The vendor had had the exchange set aside for fraud by the vendee. But it was held that the broker could keep his commission, on the ground that he had earned it when his principal accepted the offer of exchange. It is said by the court that "when such a proposition is not accepted by the owner, the agent, before he can recover his commission, must affirm-

atively show that the purchaser he has found is willing and able to purchase or exchange upon the terms offered by his principal."

Even if these cases be considered as correctly stating the law on the subject, it is submitted that they do not cover the present case. In this case, as already shown, there never was any acceptance, formal or informal, of Easter or the Tri-State Coal and Coke Company. There never was any offer on the part of either Easter or the company to purchase the land on any terms. The greatest extent of any possible claim on the part of Milliken here must be that the purchaser said he would buy *if* certain things could be arranged in reference to the branch railway. There never having been any unconditional offer of purchase, there could not have been, of course, any acceptance; and when it is considered that not only was this particular condition annexed to every proposition that was made by the proposed purchaser, but that none of the terms of sale was ever discussed, except the mere question of the price per acre, and that what that price should be was a matter of difference between the parties until the close of the negotiations, it is quite apparent, we submit, that the authorities cited by the Court of Appeals have no application to this case.

In Butler *v.* Baker, 17 R. I., 582, the court declined to decide whether, in a suit brought by a broker for commissions, the burden of proving the purchaser able to purchase was on the broker or the vendor. It appeared that there was no evidence offered by the plaintiff on the question of the purchaser's responsibility; but the defendant put in evidence which warranted the jury inferring that the purchaser was unable to complete the purchase. A contract of sale had been entered into between the vendor and the purchaser. In other words, there was a complete acceptance by the vendor of the purchaser produced by the broker. It was held that the production of a purchaser by a broker is an implied representation by him that such purchaser is able financially to complete the purchase, and that the vendor has a right to

rely on this implied representation arising out of the broker's duty under his contract. It was also held that if the broker had any or had no knowledge of the responsibility of the purchaser, he should tell his principal, who might then investigate the subject for himself. Failing to do this, the court held a broker is not entitled to a commission if the purchaser fails to financially carry out the contract of sale. In this Rhode Island case the sale fell through because of the inability of the purchaser to carry out his contract.

In Snyder *v.* Fidler, 125 Iowa, 382, and in McGinn *v.* Garber, 125 Iowa, 533, it was held that although the owner enters into a contract to sell with the purchaser, the broker must show not only the making of such a contract, but that the purchaser was able to perform it.

In Iselen *v.* Griffith, 62 Iowa, 670, it appeared that the broker had found a customer who in writing offered to buy the land involved on the owner's terms. It was held that the broker could not recover his commission without showing that the customer was able as well as willing to buy.

In Zeidler *v.* Walker, 41 Mo. App., 118, a broker had produced to his principal a prospective purchaser who entered into a written contract of purchase. In an action by the broker to recover his commission it was held that judgment was properly rendered against him because, among other things, he offered no evidence at the trial tending to show that the purchaser was financially able to buy.

In Coleman's Executor *v.* Meade, 13 Bush., 358, it was held that if the principal accepts the purchaser, either upon the terms previously proposed or other terms agreed upon between them, "and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned." And it was further held in that case that if the principal rejects the purchaser the broker must show that the person furnished was "an eligible purchaser."

In Grosse *v.* Cooley, 45 N. W. Rep., 15 (case decided by

the Supreme Court of Minnesota in 1890), which was a suit by a broker to recover his commission, the court says:

> "Solvency is always presumed until insolvency is proven. The presumption is that the purchaser was able to perform the obligations assumed by his contract."

But in that case the purchaser had not only been accepted, but had entered into a written contract by which he had agreed to buy the land on the owner's terms, and he had paid $200 earnest money on the bargain. There was no evidence in the case that the purchaser had ever refused to carry out his bargain.

In referring to the above case in Minnesota, the Supreme Court of Nebraska, in Stewart *v.* Smith, 50 Neb., 631, says that it is equivalent to holding that where the broker has procured a purchaser who has *entered into a contract* for the purchase of the property, his ability to buy will be presumed in the absence of evidence to the contrary. The Nebraska court declines to decide whether that is the law in Nebraska, but does decide that if it is the law it does not relieve the broker of the burden of proof on that point, where no contract of purchase is entered into.

In Dent *v.* Powell, 93 Iowa, 711, 714-716, a cash deposit had been made on account of a purchase of real estate. The sale fell through and the owner of the land sued the brokers to recover the deposit. They set up as a counter-claim that they were entitled to a commission on the sale. All parties at the time the contract was signed knew that in order to enable the vendor to give title he had to obtain a patent for the land, and that the authorities had promised to give him the patent within a week from the date of the acceptance by the vendor of the purchaser. The contract of purchase was closed on February 27, and on March 2 following the purchasers had sufficient money in hand to make the first cash payment, but they used it on that date to buy other property. It was shown that they had interests in other property of greater value than the purchase price of the land

in question. They made frequent inquiries for the deed, but never at any time tendered the required amount of money nor showed that they had or could procure it. The evidence failed to show that at the end of the week in which they had been promised the deed they could have made the cash payment. It appeared also that one of the buyers testified that after the contract of purchase, and about March 2, he was unable to make the cash payment and refused to complete the sale; that he did not object to the delay in procuring a patent. It appeared also that the delay in obtaining the patent was not the fault of the seller, but of the officers charged with the duty of furnishing the patent. Several weeks afterwards the sale fell through in consequence of the failure of the purchasers to complete the purchase. Upon these facts the Supreme Court of Iowa said:

> "It appears without conflict in the evidence that the plaintiff was anxious to complete the sale; that he had tried to have it completed but failed; and that the only fault that could be charged to him was that he did not procure the patent and furnish the deed within the time upon which the parties had agreed. If that delay alone had defeated the sale, it is probable that the defendants would have been entitled to recover the compensation claimed, and their alleged right to recover is really based upon that delay. But the burden was on them to show that the purchasers were able and willing to complete the purchase within the agreed time, and that has not been shown."

The judgment below in favor of the brokers was reversed accordingly.

In Sullivan *v.* Milliken, 113 Fed., 93 (a case in which this defendant in error was the plaintiff), a demurrer to the declaration had been overruled in the circuit court and a verdict and judgment entered for the plaintiff for $80,000. The declaration alleged that the plaintiff had been em-

ployed to sell a large tract of land, and that he had procured a purchaser, who entered into a contract with the owner by which he agreed to buy, if on examination of the land it turned out that statements made in a certain prospectus which Milliken had prepared and given to him were true.

The judgment was reversed, on the ground that the declaration did not allege either a completed sale or an enforceable agreement to buy.

In Alt *v.* Doscher, 102 App. Div., 344—affirmed without opinion in 186 N. Y., 566—the law on this subject in New York is thus stated:

> "If the broker procures a purchaser and *a valid and enforceable contract* of purchase is entered into between such purchaser and the broker's principal, the broker is entitled to his commission although the purchase fails because of the inability of the purchaser to perform the contract on his part, this on the theory that a broker is an agent employed to make bargains. Where such a contract is not entered into the broker is required to prove the financial responsibility of the customer produced, 'because he "must prove, before he can recover, that the failure "to make a contract was the fault of the principal "and not his own.'"

V.

The Second Assignment of Error.

This assignment of error is based upon the refusal of the court to grant the fifth instruction asked on behalf of Dotson at the trial (106). This instruction is printed in full on page 5 of this brief. By this request for instruction to the jury the court was asked to state to the jury, in substance, that if both Milliken and the prospective purchaser produced by him knew, while the negotiations for the sale of the land to the purchaser were going on, that the railway com-

pany had not unconditionally agreed to build the branch railway, the plaintiff could not recover.

In rejecting this and the other instructions asked for on behalf of Dotson at the trial, the presiding justice said:

> "But the prayers are all based on the theory that after the purchaser was ready to comply with the sale, and that was the only thing that prevented the sale, that because he afterwards, in order to consummate that sale, then undertook to try to induce the railroad to build, and then found out the true condition of things, that, having done it at that time, he is not entitled to recover in this action" (88).

Applying this remark to the fifth prayer, now under consideration, we understand it to mean that the court refused to grant it because it directed a verdict for the defendant if after Milliken had earned his commission by producing a purchaser who was able, ready, and willing to buy, and who did not buy because of Dotson's failure to get from the railway company an unconditional agreement to build the branch railroad, Milliken for the first time ascertained that the railway company had made to Dotson no such unconditional promise.

But it is only necessary to look at the instruction to see that it is open to no such construction. It reads:

> "If the jury believe from the evidence that any *bona fide* purchaser was actually found by the plaintiff for 10,000 acres of said land, as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands, and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge and cooperation of said plaintiff and at his suggestion sought and undertook to verify the truth of such statements and representations *during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof,*" etc.

The Court of Appeals, in dealing with this assignment of error, says (107):

> "This instruction was refused, as we draw from the remarks of the court recited in the bill of exceptions, not for the reason that it did not embody a sound rule of law in the abstract, but because it had no foundation in the evidence. As said by the learned trial justice, the evidence had no tendency to show that the plaintiff did not fully rely upon the defendant's representation of the promise to construct the railway to the land. Assuming it to be true, as testified to by the defendant, that the plaintiff, while he was engaged in efforts to procure a purchaser, saw the letters that had been written to the former by the president of the Southern Railway Company, Mr. Spencer, still that correspondence did not inform him of the falsity of the representation upon which he acted. The letters do not contain a positive agreement to build the railway, but they do show that Mr. Spencer was deeply interested in the possible advantage to result from the development of defendant's lands, and was willing to build upon some certainty of immediate development of the coal mines."

The court then goes on to refer to the evidence in the case, and reaches the conclusion that the negotiations were closed on the 25th of August by the agreement of the purchaser to take the 10,000 acres subject only to the condition in reference to the branch road. It has already been shown, we submit, that there were various other terms and conditions of the proposed sale necessary to a complete agreement or purchase about which the parties disagreed or which they had not even considered. But we will now present to the court the evidence which, as we claim, *entitled Dotson to have submitted to the jury* the question whether or not before the negotiations closed both the plaintiff, Milliken, and Easter, knew that there was, to say the least, a serious question whether the railway company had unconditionally agreed to build the branch road.

In his letter to Milliken of April 24 (22), Dotson enclosed certain prospectuses, receipt of which letter, with its enclosures, Milliken acknowledged on April 25 (36). These papers will be found on pages 23-27. They contain the following paragraphs:

> "We have an understanding with the railroads near the lands, by which they are to build a branch into the same for us *as soon as we are ready to open up coal mines and put in coke plants*" (23).
>
> "The above roads would be glad to extend branches into this property, upon the assurance that the property would be developed on large scale" (26).

As a witness in his own behalf, Milliken testified that immediately after making his contract with Dotson, in April, he went to Pittsburg and met there Easter, Wilson, Potter, and Kuhns; that his visit to them was for the purpose of making sale of the land; that he carried the prospectus with him and used it" (35). He further testified that by "Pittsburg people he meant the Tri-State Coal and Coke Company, represented by Easter, Wilson, and Judge Potter. * * * Easter and Wilson and Judge Potter then agreed that Easter and their mine expert, Humphrey, should go with witness to the property and go over it" (29).

In Dotson's letter to Milliken of April 24, above referred to, he said:

> "If you are interested we would be glad to see you at an early date, as we have arranged for a meeting with railroad officials the latter part of May in New York and want to complete our arrangements for the taking over and development of the property before that time, as we would want our associates, or interested with us in the proposition, to be present at our meeting with the railroad people, with a view of closing a contract with them for building branch roads into the property" (23).

In a letter from Milliken to Dotson, dated May 7, the former said:

> "I am writing to Smith, of the L. & N., and Spencer, of the Southern, to know if they will build the road in there as soon as we are ready to begin the development of the property" (37).

When this letter was produced Milliken testified in regard to it—

> "that he wrote Smith, of the L. & N., and Spencer of the Southern, as stated in his letter of May 7, 1902, for the reason that these people [not Easter of Wilson] did not know the property, and plaintiff had no communication with the railroads, and they insisted that he have something from Smith and Spencer, as plaintiff knew them both personally; they would not rely on plaintiff's statements and unless he had something back of it they would not make the deal; * * * that he wrote to Smith, of the L. & N., to get what they wanted—a letter from Dotson or Spencer that they would build the road; that he relied on Dotson and did *not* write to Spencer" (37).

It would seem sufficient to observe in this connection that, as Milliken testified he did write to Spencer and also that he did not, it was for the jury to say which of these statements was true.

On May 8 Milliken telegraphed to Dotson:

> "See Spencer and write me to-night how much development he will require before building road into property. Would two hundred coke ovens be sufficient to start with?" (28).

This telegram of itself shows that up to the time it was sent Milliken understood that the railroad would not be built unconditionally. This was in direct contradiction of his testimony (27).

It is on the answer that Dotson made to this telegram that the plaintiff principally relied at the trial. That answer was

dated the same day as the telegram—May 8 (12). In this letter, after acknowledging receipt of the telegram, Dotson said:

> "I have already discussed fully with Mr. Spencer the point with reference to extent of development he would like to have on the property to commence with, and I am glad to say that Mr. Spencer is willing to build the road into the property without placing any requirements on the property-holders to put in certain-sized plants, or any number of coke ovens. I have explained fully to Mr. Spencer our plans for the development of the land, and now ready to commence work on the road just as soon as we are ready for him to do so, and we can use our own judgment to the extent of development we would put on the lands to begin with."

Dotson testified at the trial that he had explained to Spencer the negotiations for the purchase and development of the coal lands in Harlan county, and had asked Spencer if he was satisfied to build the railroad without requiring a fixed number of coke ovens and fixed number of coal mines, and that Spencer said he would go ahead and locate the line into the lands on condition that they purchased the 120,000 acres (58).

Spencer, as a witness for the plaintiff, on the other hand, testified that he never made any agreement or promise to construct a branch railway into the Harlan County coal lands; that he had merely expressed a willingness to take up the matter with the defendant and others, provided there were assurances of a sufficient amount of business to warrant its construction in the opinion of the company, but these assurances were never forthcoming (13). Spencer, however, admitted that during the summer of 1902 engineers of the railroad company were engaged in locating a line of road in that section, as preparatory only to a possible construction, and that the company acquired rights of way over some portions of such a road, partly by donation, partly by

purchase, and partly by conditional contracts, based upon construction; that the surveys were begun about the 1st of May, 1902, and finished about September 1, 1902; "that no work of construction was done—certainly none substantial; there might have been a spadeful of dirt thrown up;" that the company's inclination to build the road, if Dotson or others had bound themselves or given satisfaction of certain developments that would have justified the undertaking, continued until November, 1902, when the monetary condition was not favorable to railroad construction (13).

In a letter from Spencer to Dotson, dated May 13, Spencer declined to write such a letter as Dotson had asked him to write in reference to the branch railroad, and said:

> "I can only repeat what passed at our interview, viz: That if the property in question, and of the amount named by you, shall be put in such shape as to insure developments on a scale which would warrant the construction of a railroad thereto, we shall be pleased to take up with you and consider favorably a plan for the construction of such a line. Of course, final conclusion must necessarily rest upon the conditions as then developed" (78).

At the trial Dotson testified positively that he had exhibited this letter to Milliken. Referring to an interval between April and some time during the summer of 1902, he said that in the meantime he "had some correspondence with the Southern Railway people that he took to Wise, Virginia, and showed to Milliken" (52).

Again he said: "Milliken saw the letter of May 13 at defendant's house at Wise, Virginia, in May" (66).

Joseph D. Dotson, as a witness for the defendant, at the trial testified that the plaintiff showed Spencer's letter of May 13 to Milliken in Wise, Virginia, "in the summer of 1902, about July 20 or 22" (75-6).

William C. Blair, for the defendant, at the trial testified that Milliken in May of 1902 told him "that the company he

represented would put in a plant and induce a road to build in there if the coal coked all right and they got the property" (75).

Charles Blair, for the defendant, at the trial testified that in May, 1902, Milliken told him, in Harlan county, Kentucky, that unless this land went into the hands of capitalists who were able to put in plants, coke coal, and guarantee shipments sufficient to pay a railroad, it would never have a railroad there; and also that Milliken then said that the Southern Railway would build this line of road into that section, "provided they take up the lands and guarantee shipments" (73, 74).

As to these conversations at Wise with Milliken in May, it should be noted that Milliken went there after he had received Dotson's letter of May 8. Milliken himself testified that he arrived in Wise county May 16 (29).

John M. Blair met Milliken in Harlan county, Kentucky, in the month of June or July of 1902, and again in the month of August following. He testified that at that time Milliken told him that no railroad would build a line into a country on any uncertain basis (76).

On the 9th of June, Milliken wrote to Dotson in reference to the investigation which Easter was then having made of the coal lands in Harlan county, and said:

> "They asked me particularly this afternoon as to how soon the railroad could be built into this land from Middlesboro. Easter asked if he could go and have a talk with Mr. Spencer on the subject, with you. I told him yes" (40).

In replying to this letter, on the 12th of June Dotson wrote to Milliken:

> "It would not be necessary for me to accompany Mr. Easter to see Mr. Spencer, as Mr. Spencer's plans are already fixed. He would not hestitate to say to Mr. Easter that they would build the road into that section at once" (32).

As a witness for the plaintiff at the trial, Easter himself testified:

> "We did not send Judge Potter to New York in July, 1902, to see Spencer, but asked him to stop on his return from New England to see Spencer or some one and ascertain the facts existing in regard to the railroad into Harlan county; that we were interested in the conditions, as late as October, 1902, upon which the railroad would be built" (18).

On the 14th of July, Milliken wrote to Dotson from the Hotel Henry, at Pittsburg, saying that the parties there had made up their minds "to take the entire balance of 100,000 acres of your lands. * * * Judge Potter, who is their counsel, and also a large stockholder, is now in New York to see Mr. Spencer in reference to when he will build the road from Middlesboro up through the lands. * * * From what you wrote me in your letter of June 12th, I take it that Mr. Spencer will talk freely with Judge Potter as to his intention to build this road at once and that we need fear no hitch on that point" (42).

This letter of June 12 (31-2) is the letter in which Dotson said it would not be necessary for him to accompany Easter to see Spencer.

On the 23d of August, Easter wrote to Spencer making inquiries as to when the branch railroad would be built. This letter is not in the record, but its date and substance are shown by the reply to it, which was written to Easter by Mr. Finley, second vice-president of the Southern Railway Company, of August 29 (21).

After Easter had so written to Spencer and before any reply had been received, Milliken, on the 25th of August, sent to Dotson his (Milliken's) letter of that date, stating that Easter had decided to take the 10,000 acres of land and had written to Spencer stating what they proposed doing and asking as to the railroad (45). It is in this same letter, it will be remembered, that Milliken says that other parties

are offering the same land to Easter at $12.50, and that Easter wishes to buy it at as low a price as possible. It is also to be remembered that, in his later letter of the same day, Milliken wrote to Dotson that he expected to return with Mr. Wilson to close up his purchase that week if Spencer replied promptly *to Judge Potter's letter.*

In the opinion of the Court of Appeals in this case, the court assumes that Easter or his company had agreed on the 25th of August to buy 10,000 acres of the land and had directed Milliken to so notify Dotson, and that the only thing that was left open was the question about the branch railroad. We have already seen, however, how many other details of the proposed purchase were still open at that time. It is to be noted here in addition that the fact that Milliken wrote these letters of August 25th does not, as against Dotson, even tend to prove that he wrote them by authority of the proposed purchaser or purchasers; and on that subject Easter, as a witness for Milliken, testified that after the return of Wilson and Kuhns (which was in August) "*we expressed a desire to talk over with Dotson in regard to the railroad being built, and at an interview with the defendant in Pittsburg in September* we informed him that we would take the 10,000 at $20 per acre if he could show some tangible arrangement between himself and the railroad company to build the line" (16). And it is admitted on all hands that before that September meeting in Pittsburg, Easter had received from Finley the latter's letter of August 29, in which he had informed Easter that no final conclusions had been reached in regard to the railroad (21).

All this was clearly evidence from which the jury might have inferred, if defendant's prayer No. 5 had been granted, that "during the pendency of the negotiations for the purchase" both Easter and Milliken knew that the railway company had not agreed unconditionally to build the railroad from Middlesboro to Harlan Court-house.

Besides, as a matter of fact it appears that the negotiations were pending long after this meeting in Pittsburg in the early part of September.

At the conclusion, apparently, of the Pittsburg meeting, Milliken took from Dotson a letter of introduction to Spencer, in which it was stated that Milliken would call on Spencer "in the interest of Pittsburg coal people who want to join us in the development of some of our Harlan county, Kentucky, coal lands, if they know that a railroad will be built into them in the near future" (53).

On the 22d of September, Milliken wrote to Mr. Finley, vice-president, that the Tri-State Coal and Coke Company contemplated purchasing, for the purpose of immediate development, about 10,000 acres of coal lands in Harlan county, and giving reasons why it would be to the advantage of the company to build the road. But, as has already been seen, on the 1st of November, Milliken wrote to Dotson that Easter was still dickering about the price of the land, saying, however, that that would cut no figure if Spencer would take up the question and write a letter saying he would build the road at once (48).

Perhaps the most important piece of evidence in this connection is a letter which Easter wrote to Milliken on the 10th of December (50). In that letter he said:

> "We went into this matter with you and Mr. Dotson upon the agreement that if your claims were not made good all expenses would be refunded to us" (50-1).

And shortly afterwards, on December 17, Milliken writes to Dotson endeavoring to throw the responsibility upon Dotson for the failure of negotiations, and adds:

> "I do feel that you should refund to me the amount of money that I have expended in carrying on said negotiations, and should pay for the labor performed and time given to these negotiations" (49).

If now the court will turn to pages 106 to 108 of the record in this case, it will be found that the Court of Appeals upheld the trial court in refusing to give defendant's instruction No. 5 to the jury upon the ground that that court, upon consideration of a part of the foregoing evidence, had come to the conclusion that "on August 25 plaintiff had brought the parties to agree to purchase and telegraphed defendant to that effect," and that before Mr. Finley's answer of August 29 was received the purchasers had made their proposal in the faith of the representations alleged to have been made by Dotson as to the branch road, and that besides Milliken had no knowledge of the letter of August 29.

Even if this were a proceeding in equity and it was for the court to pass upon the facts in the case, we would have no hesitation in asking this court to grant a reversal in this case because, taking all the evidence together, it showed that neither the plaintiff nor Easter relied upon the statement as to the branch railway contained in Dotson's letter of May 8, as to the unconditional building of the branch railway; that both Milliken and Easter were advised between May 8 and August 25 that the road would not be built unconditionally; and that Milliken was fully advised of the correspondence that was going on between Easter and the Southern Railway Company, and united with Easter and his associates in concealing from Dotson the fact that Mr. Finley's letter of August 29 was in the possession of Easter when they were pretending, at the Hotel Henry, on the 4th of September, that they were still relying upon Dotson's assurances in that regard.

But this is not a bill in equity. The trial judge had been asked to instruct the jury that if the jury should be satisfied from the evidence that while the negotiations were going on, and before they were concluded, Easter knew and Millikin knew that the railway company would require certain things to be done before they would build the branch rail-

road, the plaintiff could not recover upon the theory that the negotiations went on in reliance upon Dotson's statement to the contrary.

On the whole it is submitted that the Court of Appeals should be instructed to reverse the judgment and to remand the case to the Supreme Court of the District for a new trial.

R. BURNHAM MOFFAT,
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Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 48.

NAPOLEON B. DOTSON, Plaintiff in Error,

vs.

WILLIAM A. MILLIKEN, Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

This is an appeal from a judgment below in favor of the defendant in error, upon a contract for commissions for negotiating sale of certain coal lands in Letcher and Harlan Counties, Kentucky.

The declaration alleges that, in April, 1902, the plaintiff in error, representing that he owned or controlled one hundred and twenty-four thousand (124,000) acres of such coal lands, into which he had already obtained an agreement upon the part of the Southern Railway Company to con-

struct a branch line, contracted with the defendant in error, who entered into the contract in reliance upon these representations, that, if the latter would find a purchaser at twenty dollars per acre for either the whole or any considerable quantity of the lands, the plaintiff in error would pay him two and one-half dollars for each acre so sold; that defendant in error, who would not have entered into the contract but for the representation that an agreement had been obtained from the railway company to build a branch railway line into the lands, diligently applied himself to the negotiation of the sale, and, after an expenditure of five months of time and labor, and of about twenty-five hundred dollars in money, procured a responsible purchaser, namely, the Tri-State Coal and Coke Company, of Pittsburg, Pennsylvania, which was then and there ready, able and willing to purchase ten thousand acres of the lands, at the price of twenty dollars per acre in cash, subject only to the truth of the defendant's said representations, whereupon it transpired that the plaintiff in error had not obtained any consent or agreement by the railway company to build a branch railway, or any railway, into his lands, in consequence whereof the purchaser declined to proceed further in the matter, and the plaintiff in error thereby became indebted to the defendant in error in the sum of twenty-five thousand dollars ($25,000).

The plaintiff in error filed five pleas, of which all but the general issue were eliminated on demurrer, the pleas being accompanied by an affidavit in which the plaintiff in error "positively denies that he then or at any other time represented to the said complainant or to any other person that he had obtained from the Southern Railway Company its consent and agreement to construct a branch railway into the lands aforesaid," or that the defendant in error entered into the contract "upon the faith of the alleged representation by said defendant that he had obtained the consent and agree-

ment of the said railway company to construct a branch railway into the said lands. The defendant positively denies that he ever made such representation to the said plaintiff or anyone else." The affidavit further avers that the plaintiff knew of the state of the conferences between the railway and the plaintiff in error and the terms upon which the former would probably undertake the construction of the branch road, and that it was understood between the plaintiff in error and the defendant in error that any proposed purchaser whom he might secure should join plaintiff in error in the effort to induce the railway company to construct its road, etc.

The facts of the case, as shown by the evidence, will perhaps be best presented by being stated in their chronological order rather than by following the order in which the testimony is summarized in the bill of exceptions. Page references to the parts of the Record in which the testimony cited is to be found will accompany the statement.

The defendant in error (p. 22) introduced a letter to himself from the plaintiff in error of April 24, 1902, expressing the desire of the latter to find a purchaser for an interest in the coal lands at $17.50 per acre, and stating, "We have arranged with R. R. Cos. to build a branch into it and develop the lands." Enclosed with this letter were two circulars, one stating (p. 23), "We have an understanding with the railroads near the lands, by which they are to build a branch into the same for us as soon as we are ready to open up coal mines and put in coke plants," and the other stating (p. 26), "The L. & N. and Southern Railways have both offered to build into this property at once."

This letter was followed by a meeting between the parties in Washington, on April 30, at which the defendant in error stated to the plaintiff in error that he knew the value of the lands, but the important thing was about the railroad, where-

upon plaintiff in error replied that he had an arrangement with Spencer, of the Southern Railway, to build a road in there from Middlesboro at once (p. 27). An arrangement was then entered into with defendant in error to go to Pittsburg and secure a purchaser, at $20.00 per acre, the plaintiff in error agreeing to pay $2.50 for every acre he could sell, in such quantities as he could negotiate (p. 27). The defendant in error would not have gone into the matter without the assurance of the railroad, because, without it, he could not and would not have undertaken to sell the land, since, otherwise, the coal would have to be hauled from 20 to 25 miles in wagons, and could not be marketed. Record, p. 27.

On the night of April 30, defendant in error went to Pittsburg and began negotiations for the sale of the property, the first questions asked being in regard to the contract for the construction of the railroad, which he answered by stating that he had not made it, but that plaintiff in error had represented that he had an arrangement with the railroad people. The president of the Tri-State Coal and Coke Company insisted that there should be something in writing from the railroad company, whereupon the defendant in error wrote to plaintiff in error and received in reply the letter of May 3d, which stated that the property would be "developed by the building of railroad at once" (pp. 27-8). The Pittsburg people were not satisfied with this—were afraid that there were some conditions in regard to building the road, and insisted that defendant in error should write to plaintiff in error to find out what conditions, if any, attached (p. 29), and defendant in error accordingly wired to plaintiff in error, on May 8th, "See Spencer and write me tonight how much development he will require before building road into property. Would 200 coke ovens be sufficient to start with?" (p. 28). In reply came plaintiff in error's letter of May 8th (p. 12), "Am glad to say that Mr.

Spencer is willing to build into the property without placing any requirements on the property holders to put in certain sized plants, or any number of coke ovens. I have explained fully to Mr. Spencer our plans for the development of the land, and now ready to commence work on the road just as soon as we are ready for him to do so, and we can use our own judgment as to the extent of the development we will put on the lands to begin with." This letter was shown to Mr. Easter, president of the Tri-State Coal and Coke Company, who read it, seemed satisfied with it, and the negotiations then took the form of shipping samples of coal for examination, followed by visits to the coal lands, examining the coal openings, testing samples of the coal, etc., including horseback rides over the mountains, correspondence, telegraphing, etc., as set out at page 29 of the Record.

On May 12 (p. 39), defendant in error wrote plaintiff in error. "The negotiation has reached this point today—'if your coal will make good coke as the Stonega Coal, and if the Southern will build a branch line into the property'—the parties here will put the capital into it necessary to develop it. It is all up to you now, as the boys say, to substantiate these two points, which I believe you will do." On May 29 (p. 31), plaintiff in error writes, "I understand that the Southern Ry. Co. has secured their right of way with the exceptions of either one or two tracks from Middlesboro to Harlan C. H. I hope, however, Mr. Spencer will call his men out, and keep them out until we get our tracts rounded up, as we have requested him to do." Again, on June 12 (pp. 21-2), replying to an inquiry of Easter whether plaintiff in error and he could go together and have a talk with Spencer (p. 40), he writes: "It would not be necessary for me to accompany Mr. Easter to see Mr. Spencer, as Mr. Spencer's plans are already fixed, he would not hesitate to say to Mr. Easter that they will build the road into that sec-

tion at once." Again, on July 8, 1902 (p. 32), he writes, in reference to an inquiry whether he had offered the property for $15.00 per acre: "When we first placed the property on the market, we did offer it at this price, but, after we completed arrangements with the R. R. Co. for the development of the property, we advanced the price to $20.00 per acre, and in naming the price now to any new parties we are even naming a much higher figure than $20.00. If your parties act promptly, however, without too much delay, we will maintain the price named you of $20.00 per acre, but the railroad is now located to near the property, and work will soon be vigorously pushed, and, of course, prices will very soon be higher."

Beginning with March, 1902, and continuing with intervals down to December of that year, there was some correspondence between Mr. Spencer, the President of the Southern Ry. Co., and the plaintiff in error with regard to the building of the branch road; an examination of which correspondence will show how much it lacked of even approximating an agreement on the part of the railroad company to build a branch. Some rights of way were acquired, but Mr. Spencer himself testifies (p. 13) that, while he had expressed a willingness to take up the matter with the plaintiff in error and others provided there were assurances of a sufficient amount of business to warrant its construction, these assurances were never given, and his company had never reached a consideration of the matter of the construction. With reference to the allegations of plaintiff in error's letter of May 8th, Mr. Spencer testifies (p. 13): "There was never any agreement *or treaty* for the construction of the branch road without any requirements on the part of the owners to put in any certain size plant or any number of coke ovens, or to build whenever the defendant and his associates were ready to have the railroad company do so, leaving them free to use their own judgment as to the extent of the development they would put on the land to begin with."

With respect to the allegation of the circular placed by plaintiff in error in defendant in error's hands in connection with his first communication, of April 24, 1902 (pp. 22-26): "The L. & N. and Southern Railways have both offered to build into this property at once," the correspondence between Mr. Smith, President of the L. & N., and the plaintiff in error is set out at pages 61-2 of the Record, and is even more inconclusive and inconsequential than was the correspondence with Spencer.

On May 12, 1902, only four days after his letter to Milliken of May 8th, (Record, p. 58), plaintiff in error wrote to Spencer of the negotiation between himself and certain Detroit parties, stating: "If you can give me a letter of some kind that would be of assistance to us, that you will allow me to show these parties upon their arrival here, which will be in a few days, I think we would then be able to conclude final arrangements for the development of the property on a very large scale—we then could soon get matters arranged for you to go to work on the railroad to the property as soon as you desire"—this letter, of itself, showing consciousness on the part of the writer that he had yet to get matters arranged with the railroad company to build the branch, and the absence of claim on his part, as between himself and Spencer, that such an arrangement had already been arrived at. To this letter Mr. Spencer replied on May 13 (p. 78): "In respect to your letter to be shown to the parties you refer to, I do not see how I can at the present moment write you a letter that would be of particular service to you, *in the absence of more definite and explicit information of the obligations as to improvements to be made upon your property.* I can only repeat *what passed at our interview*, viz: That if the property in question, and of the amount named by you, shall be put into such shape *as to insure developments on a scale which would warrant*

the construction of a railroad thereto, we should be pleased to take up with you, and to consider favorably a plan for the construction of such a line. Of course, *final conclusion* must necessarily rest *upon the conditions as then developed.*"

So far from claiming, in response to this letter, that it was in violation of any previous agreement or understanding, or a surprise in any way, plaintiff in error answered it (p. 57), May 16th, as follows: "Some of the people who are to be interested in the development of the coal property are to be here today, and I will see them this evening. I am also to see the Solvey Process people Monday next, in Detroit. We expect to conclude our arrangements at an early date, and will then be ready for development of the property as soon as we can get a railroad into it—will keep you posted as the deal progresses. I have just received letters from some of our people in Harlan, stating parties were there taking right of way for the Southern Ry. road in to us *immediately after we have our plan completed for development of the territory.*"

To sustain his claim, made in his affidavit (pp. 6-7), that the plaintiff as well as the officers of the Tri-State Coal and Coke Company knew of the state of the conferences with the officers of the railway company and the terms upon which they were probably willing to undertake the construction of the branch road, the plaintiff in error testified that he showed Milliken Spencer's above letter of May 13th, shortly after receiving it, and attempted to corroborate this by the testimony of his nephew, Joseph D. Dotson, that he, Dotson, "showed this letter to plaintiff Milliken in Wise, Virginia, in the summer of 1902, about July 20 or 22, 1902, in Mr. Dotson's office, in Wise, Va.;" but, on cross-examination, this witness testified that Dotson had other letters from Spencer, some earlier and others later than the letter of May 13th, and that he "does not remember that the letter of May 13th in particular was shown the plaintiff." De-

fendant in error testifies (p. 79) that the letter was not shown to him, and that he never heard of it prior to its production at the trial—thus making a question for the jury as to the accuracy or inaccuracy of plaintiff in error's claim in this regard, upon which question he is unsupported, and is contradicted by his own letters of May 29th, June 12th and July 8th (pp. 31-2), all subsequent to May 13th, and all representing the building of the branch road as a completed arrangement with the railroad company, with "plans already fixed," and that Spencer would not hesitate to say that his company would "build the road into that section at once," there being no subsequent correspondence or communications to modify in any way the plain purport of Spencer's letter of May 13th.

With regard to his letter of May 8th, stating that Spencer would build the road without any requirement on the property holders to put in certain sized plants or any number of coke ovens, and that he was ready to commence work on the road as soon as they were ready for him to do so, leaving them free to use their own judgment as to the extent of the development they would put on the lands to begin with, he testifies (pp. 57-8) he had explained to Spencer that he was negotiating for sale of 124,000 acres of the land for development on a large scale, and had asked him if he did not think these negotiations would justify the building of the road—that the people would buy the land and develop the property, and whether he would not be satisfied without requiring a definite number of coke ovens and coal mines, to which Spencer had replied that he would "go ahead and locate the line into the land on condition that they purchase 120,000 acres;" and that, when he received Spencer's letter of May 13th, he supposed he had changed his position or mind since that conference. This, however, is contradicted by the testimony of Spencer that there was never any such agreement *or treaty;* it is not in conformity with the letter of May 8th, itself, nor with any of the subsequent letters

above noted, none of which indicate conditions of any kind, and it is wholly inconsistent with the statements at the Pittsburg conference in September, presently to be noted.

After the Pittsburg parties had visited the coal lands and had expended considerable time and trouble in investigating them, it was learned that plaintiff in error had sold to other parties, and without notice to defendant in error or his purchasers, 30,000 acres of the land they had been examining; whereupon, on July 2, the latter wrote defendant in error of their surprise that they had been asked to spend time and money over a field that had been sold in this manner, and that they would go no further with the matter unless an option on from 10,000 to 100,000 acres (p. 79) was given. Plaintiff in error testifies that defendant in error told him Mr. Easter had concluded to purchase 10,000 acres, but required an option before going further, that defendant in error prepared it, and asked plaintiff in error to grant 60 days for examination, investigation and payment, with which request he complied; that defendant in error proposed an option conditioned upon building the railroad, that plaintiff in error changed it, making it a straight option, according to his recollection, and that he delivered it to defendant in error, after which investigation of the property was made (p. 54). Defendant in error, in rebuttal, testified that the option was given by plaintiff in error on July 24 or 25, being signed at plaintiff in error's house, where it was prepared and tendered, and that defendant in error accepted it, or plaintiff in error may have sent it to Easter; that defendant in error may have mailed it to Easter, but he can not tell whether he did (p. 80). The option itself (p. 20), was as follows:

> "Virginia Coke and Steam Coal Company hereby grants to T. J. Easter, of Pittsburg, Pa., an option to purchase ten thousand acres of land in Harlan County, Ky., at the price of twenty dollars per acre, at any time

within sixty days from this date, *in consideration of and on condition that* the said T. J. Easter shall forthwith *send an engineer to examine and report on said land.* Said examination to be completed and report made, and the said Virginia Coke and Steam Coal Company notified within thirty days from this date, and upon receipt of said report said T. J. Easter shall elect as to whether or not he will accept this option and purchase said property, and if, on receipt of said report, the said T. J. Easter notifies the said Virginia Coke and Steam Coal Company of his intention to purchase said land within said thirty days, then the said purchase is to be completed, the money paid, and deed in fee to said land executed within sixty days from this date.

"Witness the following signature on this 24th day of July, 1902.

"VIRGINIA COKE AND STEAM COAL COMPANY,
"By N. B. DOTSON, President."

Easter testifies that his company was unwilling to invest in any property which could not be developed almost immediately; that defendant in error produced plaintiff in error's letter of May 8th, stating he had completed arrangements with Spencer to construct a railroad without any particular assurance as to the improvements which would be necessary; that, after the option, Mr. Wilson, of the Tri-State Company, with a Mr. Koontz, made another trip over the property and, after their return, they had an interview with plaintiff in error in Pittsburg in September, at which they informed him that they would take 10,000 acres at $20.00 per acre, if he "could show some tangible arrangement between himself and the railroad to build the line," and asked him what assurances he could give in this regard, to which he replied that he had Spencer's verbal promise to build, that he had nothing in writing, but that he considered Spencer's word as good as a written contract; that no sufficient assurances could be gotten from plaintiff in error at this meeting, but he promised to effect a meeting later with the railroad people, at which he was sure a written

agreement could be had; that no such assurance was ever produced; that his company did not buy the land because there was no prospect of a railroad nor any arrangement existing for its construction; that they failed to close the purchase at the meeting in Pittsburg referred to because Dotson could give no assurances that the road would be built, and had never been able to do so since that time, and that they, for this reason, gave up the entire proposition and purchased elsewhere; that they would not think of buying land in that section without a railroad, and had refused to take up the matter seriously until after Dotson's letter of May 8th (pp. 15-16). In January, 1903, plaintiff in error wrote Easter, denying that defendant in error had been authorized to sell the 10,000 acres, but agreeing to convey if Easter's company was ready to settle; to which Easter replied that, upon the faith of plaintiff in error's letter of May 8th (pp. 15-16),

~~In January, 1903, plaintiff in error wrote Easter, denying that defendant in error had been authorized to sell the 10,000 acres, but agreeing to convey if Easter's company was ready to settle, to which Easter replied that, upon the faith of plaintiff in error's letter of May 8th,~~ he had gone to Kentucky with a coal mine manager, ridden over the mountains, examined the coal veins, later sent two mining engineers, at heavy expense, for further examination, then decided to purchase the 10,000 acres and requested defendant in error to notify plaintiff in error to that effect, that the latter then came to Pittsburg, where the parties met, and where Easter's company was ready to close the purchase, called for plaintiff in error's contract for the building of the road, was surprised by his admission that he had no contract in writing, though claiming that he had a verbal agreement, that Easter then asked him to get a letter from Spencer to that effect, which plaintiff in error undertook, but did not do, and that, as they would not think of buying land in that section without a rail-

road, they had dropped the entire matter, had made other arrangements for coal lands, were then developing them, and did not care to purchase any more (pp. 10-17).

On August 25, 1902 (pp. 44-5), defendant in error wrote plaintiff in error: "I have met Mr. Easter, and they have decided to take 10,000 acres of coal lands, on condition that Mr. Spencer will assure them as to the building of the railroad to Harlan C. H. They have written to Spencer, and stated what they proposed doing, and asked as to the railroad. So, if his answer confirms what you have represented on this point, they will close the purchase of the 10,000 acres." He appears to have telegraphed to similar effect, and, on August 26th (p. 33), plaintiff in error answered: "Your telegram informing me that your parties have decided to take ten thousand acres positively, and possibly twenty thousand acres, is received. I presume you will have heard from Mr. Spencer before this time and will be able to close the matter up." On August 25th, defendant in error wrote a further letter to plaintiff in error, saying a negotiation for sale of the remainder of the land had been entered upon. Easter's correspondence with the Southern Railway, referred to above, is set out at pages 14-15 of the Record, ending with the announcement by the railroad company that, while construction of a line into the property mentioned was under investigation and consideration, no final conclusion had been reached.

The Pittsburg conference occurred on September 4th, at plaintiff in error's room in the Hotel Henry, in that city, the Tri-State people announcing their readiness to take the 10,000 acres, but requiring assurances with regard to the building of the road. Plaintiff in error stated that he had simply a verbal arrangement with Spencer, but that he could get a letter from him saying that he would build the road at once. Easter and Wilson stated that, if such a letter were obtained, it would be satisfactory, and, at the conclusion of

the meeting, plaintiff in error asked defendant in error to go to New York for such a letter, who, on arriving there, found Spencer was in Europe. He asked the Tri-State people to give him time, which they agreed to do. He met plaintiff in error in Washington, arranged to go with him to New York on September 20th or 21st to try to arrange the matter; they met there on the 22d of that month, at the office of a Mr. Perin, at which meeting Perin and Dotson asked defendant in error to write a letter to Vice-President Finley, whereupon he wrote a letter which he gave to plaintiff in error, after it had been discussed by the three persons named (pp. 29, 30). Perin (p. 67) states that the letter was written in the presence of Dotson, or subject to his scrutiny; while plaintiff in error (p. 52) states that the defendant in error and Perin got together and agreed each to write a letter, to be submitted to Vice-President Finley. This letter, undated, but written on September 22nd, under Dotson's supervision and scrutiny, and which was left in his hands by defendant in error and by him forwarded to Finley, through Perin (p. 30), is set out at page 34 of the Record and states, in terms, that, "with the understanding that Mr. Spencer, President of your company, had verbally agreed to build the proposed branch line to Harlan C. H., it (The Tri-State Coal and Coke Company) have agreed to purchase and develop the same."

According to the printed record, the only testimony offered by Dotson in support of his claim that the Tri-State Coal and Coke Company knew of the conferences with the railway company's officers, and the terms upon which they would probably undertake construction of the branch road, is his unsupported statement, at p. 64, that "they knew of all the negotiations with Spencer." It is, perhaps, fair to state, however, that his testimony, at p. 53, that, at the Hotel Henry conference, he had "the letter of September 5th there" is a clerical error for "the letter of May 13th," hereinbefore

referred to; the letter of September 5th being written the day after the Hotel Henry conference, and being a mere letter of introduction, containing nothing of importance to the controversy. Both Milliken (Record, p. 79) and Easter (Record, pp. 18-21) deny plaintiff in error's testimony as to his production of this letter at that conference, the controversy being one of fact and presenting no question for consideration by this court, and indeed, being without importance in any view as to the disputed fact, it being then too late for the plaintiff in error to escape the duty of compensating the defendant in error in accordance with the contract between them by notice, at that stage of the negotiations, that his representations had been unfounded.

Some of the witnesses in Kentucky, called by the appellant, gave testimony tending to prove that the defendant in error had made statements to them that certain developments of the coal lands were necessary to induce the building of a railroad, that it would be necessary to that end for the people to sell their land to companies like his, which could offer such inducements, that he endeavored to have one or more of these witnesses secure certain locations for him, and encouraged them to give options on the land (Record, pp. 72-77). The defendant in error (Record, pp. 78-79) denies that he made such statements or asked anyone to get locations for him, testified that he had said nothing at all about buying land, and that the only land mentioned in his transaction was the 124,000 acres mentioned in Dotson's first letter or prospectus, as already owned or controlled by him. Plaintiff in error's witnesses upon this point testify to precisely the same conversations between him and themselves, and it is, perhaps, possible that they confused these conversations with those between themselves and the defendant in error. At all events, the question as to the truth of the conflicting statements was one for the jury, as to which no question of law is presented.

POINTS AND AUTHORITIES.

No exceptions were taken to the rulings of the court in the admission or rejection of testimony, and the only questions presented by the bill of exceptions relate to the granting by the court of the single prayer presented by the appellee, its rejection of the eight prayers offered by the appellant, and the fact that it passed upon the prayers in the presence and hearing of the jury, to which action, after it had been fully completed, objection was first made and exception noted.

In this court the assignments of error extend only to the granting of the single prayer offered on behalf of the defendant in error (Record, p. 80), and the rejection of the fifth prayer offered by the plaintiff in error (Record, p. 83).

I.

THE OBJECTIONS, RAISED HERE, TO THE GRANTED INSTRUCTION.

The objections presented in the opposing brief to the granted instruction may be summarized as follows:

1. Because the instruction permitted a verdict for plaintiff without requiring a finding that any particular 10,000 acres had been agreed upon between the plaintiff in error and the alleged purchaser.

2. Because the instruction permitted a verdict without a finding that the purchaser was willing to buy on terms satisfactory to the plaintiff in error, or that they had agreed on terms.

3. Because the purchaser's requirement was, not that plaintiff in error's representation in regard to a branch railway should be shown to be true, but that he should obtain

a binding contract from the railroad company to build the branch railroad.

4. Because the instruction left to the jury, without proof, the question whether the purchaser produced was able to make the purchase.

I.

But little of the opposing brief is devoted to the first of these objections; namely, that the evidence did not show, and that the instruction did not require the jury to find, that any particular 10,000 acres had been agreed upon between the plaintiff in error and the purchaser.

Of the three cases cited in support of the objection, the first, Nippolt vs. Kammon, 39 Minn., 372, was a suit between the vendor and vendee for specific performance, the right to maintain which rests upon very different principles from those suporting the right of a broker to sue for commissions. The fact that a contract is not specifically enforceable because of insufficiency or uncertainty of description, as for example to convey "320 acres of Dakota land," does not render the contract void, or non-actionable, Brown vs. Munger, 42 Minn., 484-5. And, as will presently be shown, it is no part of the broker's duty to see that a contract is executed.

In Brockway vs Frost, 40 Minn., 155, the second of the cases cited, the defendant had contracted to give the plaintiffs a warranty deed for 8.61 acres out of a larger tract, but reserved the right to sell the land within ten days at $150 per acre. The plaintiffs alleged he had sold the land, and the action was to require him to account to the for the purchase money received. Neither they nor he selected, or in any manner designated, the 8.61 acres to be conveyed, nor does it appear that the defendant was not still able to convey to the plaintiffs as he had contracted to do. Had he owned but the 8.61 acres, his contract would have been suf-

ficiently certain, even for the purposes of specific performance. Sanborn vs. Nockin, 20 Minn., 178.

Monk vs. Parker, 180 Mass., 246, the only remaining case cited in support of the objection, is an authority for the defendant in error, fully supporting the judgment of the court below. The suit was by a broker to recover his commission for negotiating a sale of 290,000 feet of ground to be taken from a parcel containing 500,000 feet, "said 290,000 feet to be divided as to front and back lands from the whole parcel as nearly equal as possible," and the defence was the same as that sought to be made here, namely, that there was no meeting of minds upon the specific land which was to be conveyed; *Held*, that the question was, not between the vendor and vendee, but between the vendor and his broker; and that the former having accepted the contract, in the form it bore, as satisfactory, he could not now be heard, as between himself and his broker, to say that it was too indefinite.

Applying this authority to the case at bar, the plaintiff in error, claiming to own or control a tract of 124,000 acres, agreed with the defendant in error that, if the latter would secure a purchaser for the whole or any considerable part of the land at the rate of $20.00 per acre, he should receive the agreed commission; and, the latter having by the expenditure of much time and effort found a purchaser, the plaintiff in error (Record, p. 20) gave the latter an option "to purchase 10,000 acres" of the land at the price named, upon his election to do so within 60 days after sending an engineer to examine and report on the lands, the option containing no reservation and imposing no restriction as to the land to be selected. The engineer was sent, examined the land and made his report, the purchaser elected to purchase, and directed the defendant in error to notify the plaintiff in error (Record, p. 17), who did so (Record, pp. 44-5), thus constituting a contract between the parties, enforce-

able even under the strictest requirement of the Statute of Frauds, and one which did not fail of consummation because of any non-acceptance of it on the part of the plaintiff in error, nor because of any question as to the location of the 10,000 acres. The judgment, it is submitted, is in every essential particular identical in principle with that in Monk vs. Parker, and requires no more pertinent or apposite citation upon which to base affirmance.

In the case at bar, the plaintiff in error did not merely "accept" the contract, in the form it bore; it was he who gave it its form, in the option which he prepared and sent to the purchaser. And not only did *he* fail, at any time, to object to its form, or to give countenance to the objection which his counsel are seeking, on appeal, to make for him, but as late as January 24, 1903, in his letter to Easter of that date (Record, p. 16), although he does not hesitate to deny having authorized Milliken to sell at all, he states: "If he has made sale to you of the ten thousand acres at $20.00 per acre, and you are ready to settle for the lands, we are willing to pay him his commission. * * * If you bought the land at $20.00 per acre, we are perfectly willing that you should have them, and are ready to make you conveyance of the property upon payment of the price of $20.00 per acre;"—in other words, if Milliken has sold Easter, or his company, 10,000 acres of the land at $20 per acre, Dotson, or his company, were perfectly willing that Easter should have them, and were ready to make him a conveyance of the property upon payment of the price, without raising any question as to which 10,000 acres had been selected. And this is precisely in accordance with the agreement, undisputed, under which Milliken undertook the negotiation, namely, "that defendant would give plaintiff $2.50 for every acre he could sell, in such quantities as he could find a purchaser for" (Record, p. 27), without reservation or restriction as to the location of the quantities sold.

With respect to this first objection to the granted instruction, it will not escape the attention of the court that the major portion of the opposing brief is devoted to the question whether, not having been made in the trial court, it can properly be presented in this court at all. We submit that it cannot be.

The contention in question was first made in the closing argument before the Court of Appeals, having been embraced neither in the assignment of errors, in the opening argument, nor until the argument on behalf of the defendant in error had been concluded. The fact that it was not made at the trial was conceded, and is expressly stated in the opinion below (Record, p. 105).

It can not be necessary to enter upon any academic discussion of the general exceptions which may, and which may not, be first made and relied upon in an appellate court, or to discuss and distinguish the cases cited in that connection at pages 12 to 18 of the brief for plaintiff in error, for the reason that the question, in its relation to the present case, is determined by the authority of this court.

Where an instruction, generally correct, is objected to on some special ground, that ground must be pointed out and a qualifying instruction asked, or the objection can not afterwards be maintained. Thus, in McNitt vs. Turner, 16 Wall., 352, 362, the court, over a general objection and exception, had directed a verdict for the plaintiff in an action of ejectment. There was a defect in the chain of deeds proving the title; but the exception was discountenanced by this court, on the ground that it was the duty of the party excepting to point out specifically, and to direct attention to, the definite objection. To like effect and conclusive of the question are R. R. Co. vs. Horst, 93 U. S., 299; Ry. Co. vs. Ives, 144 U. S., 414-5; McDermott vs. Severe, 202 U. S., 600, 610-1; R. R. Co. vs. Mackey, 157 U. S., p. 86. See

also, Wiggmore on Evidence, p. 57; Bell vs. Denson, 56 Ala., 449; Warren vs. Wagner, 75 Ala., 188, 205.

Further upon this point, the rule is that, the sale having failed because of the fault, default and misrepresentations of the plaintiff in error, he can not defeat the broker of his compensation because of some element in the contract which it may be conjectured might, within the range of possibility, have interfered with its consummation, but which in fact did not do so. Where one of the parties is prevented from performance by the other, it should be taken as *prima facie* true that he would have performed but for such prevention. McCreery vs. Green, 38 Mich., 172, 182.

Finally upon this point, the objection is not supported by the authorities. As above pointed out, but three citations are offered in support of it, two of which are irrelevant, and the third of which sustains the right of the broker to recover, under precisely similar circumstances. The attempt to distinguish the authorities cited in support of its judgment by the court below (Record, p. 105) is unsuccessful. This is particularly true of Armstrong vs. Mudd, 10 B. Mon., 144, which case, we submit, is of itself conclusive, since it establishes the law of the state where the land covered by the contract in the case at bar is located, and in accordance with which law it must accordingly be construed.

In that case, a series of mesne conveyances purported to convey 200 acres of land out of a larger tract, beginning at a fixed point and running thence with a certain line "so far as to make one side of the said tract of 200 acres hereby conveyed; thence in such course and directions as will cause the said quantity of land to be in a parallelogram, or which shall not be more than twice as long as it is wide." The last grantee under these conveyances, Mudd, himself made a deed specifically locating the 200 acres, and the court said: "The question, then, is, had Mudd a right, holding

under these deeds, to give form and locality to the 200 acres which they conveyed? The general rule is, that of everything uncertain which is granted, election remains to him to whose benefit the grant was made to make the same certain (Viner's Abridgment, vol. 14, p. 49); and a description in a grant which can be made certain is sufficient, and the land will pass to the grantee (Sheppard's Instructions, vol. 1, 250). According to this doctrine, as the description of land would be rendered certain, these conveyances passed the title to Mudd; and, as none of the previous vendees had exercised the right of election, it passed to him, also, as an incident to the title. When he had the land surveyed, and sold a certain boundary that was consistent with the description contained in the deeds, the act of thus selling amounted to an election, and rendered the form and boundaries of the land conveyed certain, although it had been previously uncertain."

Under the *lex rei sitae,* therefore, concurring with every other consideration in the case, the objection is untenable.

See, also, Burrows vs. R. R. Co., 107 Ind., 432-435-6.

2.

The second objection, that the granted instruction permitted a verdict without a finding that the purchaser was willing to buy on terms satisfactory to the plaintiff, is largely open to the same infirmities. No such point was made below—not even in the Court of Appeals; no such point was included in any of the numerous instructions asked on behalf of the plaintiff in error, nor any suggestion made that the instruction granted on behalf of the defendant in error needed to be modified in any such respect. It is entirely obvious that the failure to consummate was not because of any inability to agree on terms, and that no question of difficulty in respect to them was even mooted be-

tween the parties. The plaintiff in error offered the land at $20.00 per acre; the purchaser directed the defendant in error to give notice of its acceptance, and the notice was duly given, nothing being said on either side about any extension of credit, or of deferring the payment of any part of the purchase money, which circumstance, alone, was in law an agreement for a cash sale, even if the contract had been silent upon the subject.

The offer of the plaintiff in error, however, was to sell at the stipulated price, the money to be "paid, and deed in fee to said land executed, within 60 days from this date" (Record, p. 20), which offer was duly accepted by the purchaser.

The suggestion that the purchaser might have "declined to proceed further because the railway company would not at once build the branch railway," is equally without support. The instruction complained of required the jury to find as the condition of a verdict for the plaintiff that the sale failed "because of the inaccuracy of defendant's representations that the said railway company had so consented and agreed to construct a branch railroad into the said lands."

That this was the cause, and the sole cause, of the failure, is indisputably established by the testimony. "We did not buy the land for the reason that there was no prospect of a railroad, or any arrangement existing for a railroad to be built to the tract" (Record, p. 16).

The claim, under this head, and upon the alleged authority of McGavock vs. Woodlief, 20 How., 221, that the broker must complete the sale, is erroneous in any other sense than that explained in McGavock vs. Woodlief: "He must find a purchaser in a situation ready and willing to complete the purchase on the terms agreed on."

The effort, at pages 20 to 23 of the brief, to create some appearance of an unsettled or undetermined status in regard

to the terms, depends for its effect upon the blending together and confusing of three separate and distinct periods in the negotiation, namely:

1. The period preceding the meeting between the parties, on April 30th, at which the defendant in error undertook the negotiation, under an agreement that he was to receive $2.50 for every acre he could sell, in such quantities as he could find a purchaser for at $20.00 per acre (Record, p. 27). The letters of April 24th and 25th, at page 21 of the brief, ante-date the contract, and can not obscure or confuse the distinct agreement of April 30th, the terms of which are not disputed by either party.

2. The period between the agreement of April 30th and the meeting of the parties at the Hotel Henry in Pittsburg, on September 4th, when the contract to purchase, theretofore validly made, failed of consummation "for the reason that there was no prospect of a railroad or any arrangement existing for a railroad to be built to the tract."

It was during this period that Dotson gave the option to purchase the 10,000 acres at $10.00 per acre, and that the purchaser accepted it. It is true that at one time, during this period, Milliken proposed an attempt at the formation of a stock company in which Dotson should unite in the purchase, and take stock. It is, also, true that on August 14th, in informing Dotson that he felt quite certain that the Tri-State Coal Company would take the 10,000 acres, he added he should try to get them to take 20,000, and allow Dotson to take 49 per cent in stock of the company; and it is also true that, in communicating the acceptance of the 10,000 acre offer, Milliken was under an apprehension, which proved unfounded, that Easter might try, notwithstanding his acceptance, to get a lower price through some other party, or that other persons professing to represent Dotson might interfere with the negotiation by offering the

land at a lower price. The fact, however, remains that, on July 24th, Dotson offered the 10,000 acres in writing, at $20.00 per acre, the purchase to be completed, the money paid and the deed in fee executed within 60 days from that date (Record 20), that Milliken was authorized by the purchaser to notify Dotson of the acceptance of the offer (Record, p. 17), and that he did so (Record, pp. 44-5), thus completing a definite, specific contract, none of the terms of which were left in doubt.

3. The period following September 4th, when the contract failed, on discovery and because of the unfounded character of Dotson's representations, and during which time, notwithstanding that fact, Milliken made some effort to assist Dotson in making terms with the railroad company (Record, pp. 46-8), and Dotson later, denying that he had authorized Milliken to sell (Record, p. 16), undertook a new negotiation on his own account with Easter (Record, p. 20).

Under this second objection, the brief for the plaintiff in error cites, at pp. 19-20, the slender showing which exists for the proposition that a broker is not entitled to his commission unless a valid contract between his principal and his purchaser is signed by them. The recent opnion of this court in Crowe vs. Trickey, 204 U. S., 228, cited in this connection, is, itself, fatal to the proposition, approving, at p. 239, Holden vs. Starks, 159 Mass., 503.

That, in order to recover compensaton for his services, the broker need only produce a purchaser ready, able and willing to purchase on the terms required, and that a written, binding agreement is not a necessary prerequisite, is the almost uniform current of authority.

> "Making or not making a contract with the customer produced, and enforcing or not enforcing a contract, if made, are matters for the broker's principal to do

or not to do, as his ability or inclination determines. They are matters with which the broker is not concerned, and on which his right to a commission is not dependent. That it is no part of a broker's duty to draw up and see to the execution of a contract between his principal and his customer is settled."

Fitzpatrick vs. Gilson, 176 Mass., 477.
Cook vs. Welsh, 9 Allen, 350.
Desmond vs. Stebbins, 140 Mass., 339, 342.
Middleton vs. Thompson, 163 Pa. St., 112.
Keyes vs. Johnson, 68 Pa. St., 42-3.
Duclos vs. Cunningham, 102 N. Y., 178.

Fitzpatrick vs. Gilson further recognizes and enforces the rule that a broker's right to his commission is not defeated by the principal's inability to perform.

Washburne vs. Bradley, 169 Mass., 86, having held that the vendee's declination to consummate the contract because of his discovery, after signing, of the inaccuracy of the vendor's representations, does not defeat the broker's right to recover, the court in Fitzpatrick vs. Gilson, 176 Mass., p. 480, declares the rule to be the same where the inaccuracy is discovered before the signing of the contract.

So in Koch vs. Emmerling, 22 How., 69, the broker was held to be entitled to his commission where his purchaser was ready and willing, and the sale failed through the vendor's default, though the contract does not appear to have been in writing.

In Vaughn vs. McCarthy, 59 Minn., 199, 203, it is expressly held unnecessary to the broker's recovery that the contract for sale should be in writing, and to the same effect is Holden vs. Stark, 159 Mass., 503-4, and the authorities cited in the opinion.

In O'Connor vs. Semple, 57 Wis., 243, 248-9, it was objected, as here, that the broker was not entitled to his commissions unless he had secured a valid written agreement binding his purchaser, and the court said:

"This he did not do, nor was it essential that he should. If, within the period limited, he made a verbal sale to a responsible party, and within a reasonable time thereafter gave notice, and produced a purchaser who was able and willing to purchase under defendant's terms, the plaintiff had performed on his part."

"To entitle him to his commissions, we do not think it is essential that the plaintiff should have written contracts for the defendant with the customers, in order to bind them under the Statute of Frauds. It is sufficient if the customers were ready and willing to perform their verbal contract for the purchase of the property."

Kelly vs. Phelps, 51 Wis., 455, 458.

See, also,

Cullahan vs. Baldwin, 100 Cal., 648.
Carstens vs. McReavy, 25 Pac. Rep., 471.
Barnes vs. German S. & L. Society, 58 Pac. Rep., 569-70.
Middleton vs. Thompson, 153 Pa. St., 112, 120.
Fischer vs. Bell, 91 Ind., 243.
Lockwood vs. Rose, 125 Ind., 2,588, 591-2, and citations.

"The just and well settled rule of law requires that an agent shall be paid his compensation when he procures a purchaser who is acceptable to the principal, and ready, able and willing to buy on the agreed terms, though, in fact, the sale be not ultimately consummated, provided its consummation is prevented by the fault, refusal or defective title of the principal." Cheatham vs. Yarborough, 90 Tenn., 77, 79, citing.

Mecham on Agency, 966-7; 2 Am. and Eng. Ency., 528, 581.
2 Addison on Contracts, Sec. 931.
McGavock vs. Woodlief, 20 How., 221.
Kock vs. Emmerling, 22 How., 69.
Frazier vs. Wyckoff, 63 N. Y., 448.
Cook vs. Fish, 12 Gray, 493.

Vinton vs. Baldwin, 88 Ind., 104.
Gonzales vs. Broad, 57 Cal., 224.
Schwartze vs. Yearly, 31 Md., 270, etc.

To the same effect are:

Blodgett vs. R. R. Co., 63 Iowa, 609.
Ford vs. Easby, 88 Iowa, 603.
Gilder vs. Davis, 137 N. Y., 504, 506-7.
Fitzpatrick vs. Gilson, 176 Mass., 477-8.
Roche vs. Smith, 51 L. R. A., 510.

In Washburne vs. Bradley, 169 Mass., 86, the vendee declined to consummate the contract, after signing, because of inaccurate statements made to him by the vendor, notwithstanding which the broker was held entitled to recovery of his commission.

The broker is entitled to his commission although the transaction fails because of a defect in the title, and this although the principal has made no representations in regard to the title, there being an implied stipulation, as between himself and the broker, that he has the ability to give a good title. Peet vs. Sherwood, 43 Me., 447. How much stronger is the case where he expressly stipulates that he has already perfected a necessary condition, without which the broker would not have entered upon the attempt to render the desired service?

Failure of the vendee to consummate the purchase because the principal's representation as to the property are found untrue, can not deprive the broker of his commissions.

Cohen vs. Farley, 58 N. Y., Supp. 1102.
Washburne vs. Bradley, 169 Mass., 86.
Hamlin vs. Schultz, 34 Minn., 534.
Strong vs. Prentice, 26 N. Y., Supt., 85.

3.

The third objection to the granted instruction is thus stated in the opposing brief, at page 25:

> "The court erred in giving the instruction in question for the additional reason that the condition upon which Easter proposed to buy 10,000 acres of land was, not that the purchaser should be satisfied that the representations made by Dotson as to the statements or promises made by Spencer to him were true, but upon the entirely different condition that Dotson should obtain from the Southern Railroad Company a binding contract to build a branch railway."

This objection, which, also, is raised for the first time in this court, is, in effect, that the instruction erred in its submission to the jury of the question whether the "sale failed because of the inaccuracy of the defendant's representations that the said railway company had so consented or agreed to construct a branch railroad into the said lands," for the reason that there was no evidence to go to the jury upon that question, the testimony being that the purchaser required the plaintiff in error to obtain from the railroad company a binding contract to build the railway.

Although it is declared to appear "all through the evidence" that the offer to purchase was based upon the condition of an agreement by the railway company to build the proposed branch, the only evidence offered in support of it is an extract from Milliken's letter of August 25th (Record, p. 45) communicating the fact of acceptance, and which quoted extract omits the following: "They have written to Spencer and stated what they proposed doing, and asked as to the railroad. So, *if his answer confirms what you have represented on this point*, they will close the purchase for 10,000 acres." In other words, the very letter relied upon

shows that all that the purchaser required was, a confirmation by Spencer of what Dotson had represented.

Perhaps it may be well, at the expense of some repetition, to refer to the representations in question.

At the initial interview between the parties, on April 30th (Record, pp. 12, 27), Milliken inquired about the railroad, and declared it to be the important thing, whereupon Dotson told him "he had an arrangement with Spencer of the Southern, to build a road there from Middlesboro at once," and that, at that time, they "had their surveyors in there and were locating a line right from Middlesboro to Harlan Court House, which is just at the edge of the land."

Upon the faith of this assurance, Milliken, on the very night of the interview, left for Pittsburg, where he commenced the negotiation, in which, although Dotson had satisfied him about the railroads, the prospective purchaser would not rely upon Milliken's statement, as he had had no personal communication with the railroads, and insisted that he should have something from Smith and Spencer, whereupon he sent to Dotson the telegram of May 8th (Record, p. 28), asking him to see Spencer and to write at once how much development he would require before building his road into the property, and whether 200 coke ovens would be sufficient to start with. Five days earlier, Dotson had written the letter of May 3d (Record, p. 28): "It is this property which will be developed by the building of railroad through it at once, which will increase the value of it several times over"; and in reply to Milliken's telegram of May 8th, he wrote his letter of that date (Record, p. 12), to the effect that he had discussed the point with reference to the extent of the necessary development fully with Mr. Spencer, and that the latter was willing to build the road into the property without placing any requirements on the property holders to build a certain size or number of coke ovens, and that he, Spencer, was then ready to "commence

work on the road just as soon as we are ready for him to do so." Following Milliken's letter of May 12th (Record, p. 39), reporting that the negotiation had reached a point at which, "if your coal will make good coke as the Stonega coal, and if the Southern will build a branch line into the property—the parties here will put the capital into it necessary to develop it. It is all up to you now, as the boys say, to substantiate these two points, which I believe you will do,"—Dotson writes him, under date of May 29th (Record, p. 31) that he understands the Southern Railway has secured nearly its entire right of way, but that he has requested Mr. Spencer to call his men out, and keep them out until he, Dotson, could get his tracts "rounded up." Under date of June 12th (Record, pp. 31-2), he writes: "As Mr. Spencer's plans are already fixed, he would not hesitate to say to Mr. Easter that they would build the road into that section at once"—this being in response to Easter's inquiry, through Milliken, whether he could go with Dotson and have a talk with Spencer on the subject (Record, p. 40). Under date of July 8, 1902, in reply to a complaint from Milliken that other parties were claiming that they could offer the property at $15.00 per acre, he writes (Record, p. 32), "When we first placed the property on the market, we did offer it at this price, but after we *completed arrangements with the R. R. Company* for the development of the property, we advanced the price to $20.00 per acre * * * The R. R. Company is now located to near the property, and work will soon be vigorously pushed, and of course the price will very soon be higher," the fact being, as testified by Mr. Spencer, that there never was any agreement or promise to construct a branch railway into the Harlan County coal lands, and, with respect to the representations contained in Dotson's letter of May 8th, that there was never any agreement or treaty for the construction of the branch road without any requirements on the

part of the owners to put in any certain size or number of coke ovens or plant, or to build it whenever Dotson and his associates were ready to have the railroad company do so, leaving them free to use their own judgment as to the extent of the development they would put on the land to begin with, etc.

These representations, commencing April 30th, and continuing to August 26th (Record, p. 33), were made in response to repeated and most explicit notices from Milliken that all the service he was engaged in performing was based upon them, and that, without them, his purchasers would not for a moment entertain the negotiation. Dotson knew they were untrue, and, himself, produces Spencer's letter to him of May 13th (Record, p. 52), when Milliken's negotiation was only about two weeks old, showing conclusively the absence of foundation for them, and which letter was followed by his reply of May 16th (Record, p. 57), expressing no surprise at the contents of Spencer's letter, making no pretense of claim that the facts were other than as Spencer states them, and making entirely apparent his knowledge, all along, that his statements to Milliken were without even reasonable color of truth. It seems a singular claim, in a court of justice, that a broker who has given five months of his life, and has expended $2,500.00 of his own money, in pursuing a negotiation known to his principal, throughout its entire course, to be based wholly upon the latter's representations, made under such circumstances, shall be defeated of his stipulated compensation if his purchaser calls for confirmation of them as the condition of consummating the purchase—especially when the principal has known, also, throughout the negotiations, that the purchaser, from the beginning, has in like manner relied upon the representations in question, and had refused at the initial stage to consider the purchase at all except upon terms of having a written assurance, direct from the principal, as to their truth.

It remains, in this connection, to consider whether there was evidence to go to the jury that the sale failed, in the language of the instruction, because of the inaccuracy of the defendant's representations that the railroad had consented or agreed to construct a branch railroad into the coal lands. That Easter had directed Milliken to notify Dotson of the acceptance of the so-called option, and that Milliken had done so, has been already more than once shown to be established, without dispute, in the record. The Hotel Henry interview, in Pittsburg, next followed, on September 4th, at which Dotson said he had simply a verbal arrangement with Spencer, but could get a letter from him, to which Easter and Wilson replied that such a letter would be satisfactory, and they agreed to give him time to get such a letter (Record, p. 30). No other demand or requirement of any kind was made, and it was only upon the failure of Dotson to furnish such a letter from Mr. Spencer, and their subsequent information that Mr. Spencer denied the existence of any such agreement as Dotson had represented, that they "therefore gave up the entire proposition, and purchased coal lands elsewhere." Record, pp. 17, 16.

The ingenious suggestion, at page 25 of the opposing brief, that Spencer might have told Dotson in April or May that he would build the branch road without condition, and that he might have forgotten this in August or September, or that he might have changed his mind, are unavailable for any practical purpose in this case. Spencer testified there never had been such an agreement, or treaty, even, which was quite enough to justify the submission to the jury; while, in the second place, and conclusively, Dotson himself, as above noted, produces Spencer's letter, not of August or September, but of May 13th, only five days after the Dotson letter of May 8th, and preceding the Dotson letters of May 29th, June 12th and July 8th, which letter of May

13th demonstrates that the suggestions in question, however ingenious, are without merit.

Two cases, Crockett vs. Grayson, 98 Va., 54, and Curtiss ys. Mott, 90 Hun., 439, are offered as supporting the proposition that the failure of a sale through false representations of the principal will deprive the broker of his commissions.

The first of these, Crockett vs. Grayson, holds expressly, at page 357, that, when the broker has found a purchaser ready and willing to purchase upon the terms agreed upon, and he has entered into a valid contract, the right to compensation will not be defeated by the fault or misrepresentations of the seller, citing McGavock vs. Woodlief, 20 How., 221; Kock vs. Emmerling, 22 How., 69; Tombs vs. Alexander, 101 Mass., 225, and Mecham on Agency, Sec. 862 *et seq.* The only question before the court was whether the principle was applicable to the case before it, in which case the owner represented, not, as in the case at bar, in his contract employing the broker, but in the agreement with the purchaser, after he had been produced, that the liens upon the property did not exceed $4,000.00, which there was evidence to show would have satisfied those for which the owner was primarily liable, while the sale failed because the liens apparent of record were $40,000.00. There was no representation in respect to the amount of the liens in the owner's arrangement with or employment of the broker; there was no claim, as here, that the broker had been led to expend his time and labor, or had done anything else, upon the faith of the representation, or that he had rendered any service at all after it had been made. His undertaking was to find a purchaser, unaccompanied by any agreement or representation in regard to liens; the purchaser procured by him agreed to buy upon a condition which the owner represented, in good faith but erroneously, to exist, after the purchaser had been procured.

In the other case cited, Curtis vs. Mott, 90 Hun., 439, the representation, which was as to the amount of the rent yielded by the property, was not shown, as here, to have entered into the broker's employment, nor to have been one without which he would not have entered upon it, nor did he show, or claim, that he had continued in the negotiation for months, at a large expenditure of both labor and money, upon the faith of the representation, deliberately and repeatedly given, in writing, with the express knowledge that it was solely in reliance upon it that both the broker and his customer was proceeding with the negotiation.

A third case, French vs. Bush-Swan Electric Lighting Company, 39 N. Y. St. Rep., cited at pp. 28-30 of the brief, is so clearly inapplicable as scarcely to require comment. The sale of certain electric light processes or appliances failed because, in a test which was made of the devices, they failed to accomplish what was claimed for them by the owners. In the employment of the broker, there was no guaranty or representation as to their sufficiency, the only representation in regard to them being contained in a description of them in a circular issued by the owner, which circular, the court held, was not a guaranty to the person accepting a commission to sell, that they would do what the circular represented.

It is evident that these, the only cases cited in support of the proposition that failure of the sale through the misrepresentations of the owner defeats the broker of his commission, are without pertinency or application to the case now before the court. In addition to every consideration which can be founded in such a case upon natural justice or reason, the contrary doctrine is supported, as pointed out above, by the authorities, of which Washburn vs. Bradley, 169 Mass., 86; Cohen vs. Farley, 58 N. Y. Supp., 1102, and Hamline vs. Schultz, 34 Minn., 534, are types.

4.

The only remaining objection urged in support of the first assignment of error is, that the granted instruction left to the jury, without proof as is claimed, the question whether the purchaser produced was able to consummate the purchase.

This objection presents, first, the question of law whether, under the circumstances of this case, the burden of proof was upon the defendant in error to show the financial ability of the purchaser, and, if so, then secondly, whether there was evidence of such ability sufficient to go to the jury upon that question.

1.

THE QUESTION OF LAW.

Where one of the parties to a contract is prevented from performance by the other, it is to be taken as *prima facie* true that he would have performed if he had not been stopped. McCreery vs. Green, 38 Mich., 172, 180-1.

Not only so, but although, according to some authorities, the broker must show that his purchaser is willing, ready and able to consummate his purchase, yet, where it appears that the proposed purchaser was accepted by the principal, the burden is upon the latter to show that the former was not able to comply. Davis vs. Morgan, 96 Ga., 518, 520; Farley vs. Wappoo Wills, 44 S. C., 227, 248; and citations; Coleman vs. Meade, 13 Bush., 358; Lockwood vs. Halsey, 41 Kan., 170, and citations; Kalley vs. Baker, 132 N. Y., 1.

That the plaintiff in error did accept the purchaser, in the sense of these decisions, can not admit of controversy. He gave it a written option (Record, p. 20)—in the name of its president, individually, it is true, but as his letters show (*e. g.* Record, p. 35), well knowing who the real pur-

chaser was. He accepted from his broker notice that the offer contained in the option was accepted by the purchaser, and went to Pittsburg to close the transaction with it, failing to do so at that time (Record, 16) only because of his inability to furnish evidence of his pretended agreement with the railroad company, although still claiming ability to do this, and agreeing to do so later. The giving of the option was, alone, acceptance within the sense and meaning of the authorities upon this subject.

In his letter to Perin of September 22, 1902 (Record, p. 35), written for the purpose of being used with the railway company in the effort to secure the letter which at the Hotel Henry interview time had been given him to obtain, he states the fact that the Tri-State Company had examined the lands, had made tests, had found the coal and coke satisfactory, and that it *had agreed to purchase* 10,000 *acres and put in coal and coke plants.*

Of the cases cited on his behalf, Butler vs. Baker, 17 R. I., 582, was one in which the evidence before the jury showed that the purchaser "was not of sufficient pecuniary ability to consummate the purchase." In Snyder vs. Fidler, 175 Iowa, 378, the evidence showed that the purchaser had no good title to the land which he was to give in exchange. In Iselen vs. Griffith, 62 Iowa, 670, there was nothing in the nature of acceptance to raise the question. Coleman's Executors vs. Meade, 13 Bush., 358, so far from supporting the proposition contended for, holds, in terms, that, if a valid contract has been entered into by the principal and the person represented by the broker, the commission is earned, and that it is only where the principal objects to the purchaser that the broker must prove him to have been eligible. Grosse vs. Cooley, 45 N. W. Rep., 15, goes further, belonging to the class of cases which hold that solvency is to be presumed until the contrary is shown, and that the presumption is that the purchaser was able to perform. In

Stewart vs. Smith, 50 Neb., 631, there was evidence upon both sides as to the financial ability of the purchaser, and the question of the burden of proof did not arise. In Dent vs. Powell, 93 Iowa, 711, also, evidence was offered as to the ability to perform. Alt vs. Doscher, 102 App. Div., 344, concedes that, where the principal and the purchaser enter into contract, the broker is entitled to payment although the purchase fails through the purchaser's inability to perform.

In the case at bar, it has more than once been pointed out that the written option given by the plaintiff in error, and the written acceptance of it by Milliken for the purchaser, by the latter's authority, duly proven, constitute a "valid and enforceable contract," under the strictest construction of the Statute of Frauds.

Sullivan vs. Milliken, 113 Fed. Rep., 193, the remaining case, and in which the defendant in error is correctly stated to have been the paintiff below, was in every essential respect like the present, except that, in it, it was the broker, and not the principal, who made the sale, and, therefore, the question as to the effect of the principal's acceptance of the purchaser did not arise. It failed because of the falsity of certain representations set forth in a prospectus prepared by the broker, from data supplied by the principal, the prospectus having been read over to him by the broker before its issuance; and the latter brought suit for his commission, on the ground that the sale had failed, as in the present case, through the principal's misrepresentations. The reversal of the judgment in favor of the broker, reported in 113 Fed. Rep., 93, turned wholly upon a question of pleading, the Circuit Court of Appeals holding that the declaration did not aver that the purchaser was ready, willing and able to consummate the purchase, or that the sale had been prevented by the wrong of the defendant, and that, therefore, the lower court had erroneously overruled the defendant's

demurrer. The declaration having been amended, and the case coming on for trial, the court instructed the jury that, if the broker believed the representations contained in the circular to be true, that they were in fact substantially false, that the defendant knew them to be substantially false, that the broker was induced by them to endeavor to find a purchaser for the property, and that the purchaser was financially able to carry out the contract, he was entitled to recover. The jury found for the plaintiff under these instructions, judgment was rendered in his favor accordingly, was affirmed by the Circuit Court of Appeals, and an application to this court by the defendant for a writ of certiorari was denied, in 192 U. S., 605, the facts above stated appearing at pp. 454-5 of the record accompanying the application for the writ. Case No. 517, October term, 1903.

As shown above, the weight of authority, even under the cases cited in the opposing brief, recognize the rule to be that, where the principal accepts the purchaser to the extent of entering into a contract with him, as in this case, the broker has performed his duty, and is entitled to his commission, even though the purchaser fails ultimately to perform. Follansbee vs. Sawyer, 28 N. Y. Supp., 698, cited in Alt vs. Doscher, lays down and applies the same principle, namely, that the broker's duty is fully performed, and his commissions earned, when such a meeting of the minds of the principals takes place, his right to payment being irrespective of the fact whether the agreement between the principals be valid and enforceable or not, verbal or written, plain or obscure, and no matter how indefinite the terms of the contract may be; being substantially the principle upon which, in Monk vs. Parker, 80 Mass., 246, cited in the opposing brief and discussed *supra*, the right of the broker to recover was sustained.

Even without such acceptance, many of the authorities hold, with sundry of those cited in the opposing brief, that

the solvency of the purchaser is presumed, in the absence of some contrary showing in the evidence. Henken vs. Schwicker, 174 N. Y., 298, 302; Howard vs. Hoffman, 44 How. App., 168; Cook vs. Kroencky, 4 Daly, 268; Leavy vs. Huff, 30 Abb. N. C., 291; Goss vs. Broom, 31 Minn., 134; McFarland vs. Lillard, 2 Ind. App., 160, 166; Stauffer vs. Linenthal, 29 Ind. App., 305. Among the many cases that hold that, at all events, the burden of proof shifts and the solvency of the person is to be presumed in the absence of proof, where the vendor accepts the purchaser by contracting with him, are: Parker vs. Esterbrook, 68 N. H., 349; Russell vs. Hurd, 113 Ill. App., 63; Higgen vs. Miller, 109 Ky., 209, 212; Steinbach vs. Carriage Co., 37 Fed. Rep., 760.

2.

THE QUESTION OF FACT.

But, in the second place, is it true, as claimed at page 30 of the opposing brief, that there was not "a particle of evidence tending in any degree to show that either Easter or the Tri-State Coal and Coke Company was able, either in September, 1902, or at any other date," to consummate the purchase?

Mr. Easter, President of the Company, testifies that it gave up the purchase of Dotson's lands only because of his inability to make good his representation in regard to the railroad, and that it thereupon purchased coal lands elsewhere. With the fullest opportunity for the purpose, not a question was raised upon the cross-examination of this witness, or otherwise, as to its ability to purchase, nor was there the intimation of a doubt or the reservation of any question upon that subject until after the testimony had been closed and the witnesses discharged, and then only to the extent of asking for an instruction, granted in the

charge of the court at page 91, that the burden of proof on that question was upon the plaintiff. No instruction was asked, or claim made, that there was not abundant evidence upon that subject to go to the jury.

In his letter of September 22, 1902, to C. P. Perin (Record, p. 35), written as above noted for the purpose of being used by Perin with the railway company in an effort to obtain, at that late date, the agreement he had for five months represented himself as having already secured, Dotson writes:

> "The Tri-State Coal and Coke Company have also examined a good portion of the lands, and they have made tests of the coal and coke, and find it perfectly satisfactory, and have agreed to purchase 10,000 acres and put in coal and coke plants. * * * There is no doubt about the development of this field on an extensive scale as soon as the railroad is built, which will no doubt be worth a great deal to the Southern Railway Company. * * * The people interested in the development of this field are reliable coal companies, and not speculators, and their purpose is to develop and operate the property, and not to sell to someone else for a profit."

The above letter, it will be noted, evidences, over his own signature, both the fact that the agreement to purchase the 10,000 acres had then been made, and by "a reliable coal company," not a speculator, whose purpose it was to develop a part of the property. In other words, the letter is conclusive of the fact both that Dotson had accepted the agreement of the Tri-State Coal and Coke Company to purchase, and that he, himself, knew its financial character and responsibility.

At pages 57-8, Dotson testifies that he told Spencer that he was negotiating with several parties from Pittsburg, including Easter, and that his information was that "these

were practical coal men, amply able to develop the property if they bought it, and that they were arranging for a company of $2,500,000 for the purchase of the land." In his letter to Spencer of May 12th (Record, p. 58), after mentioning his negotiations with the Solvey Process Company, he adds: "Other parties who are to take an interest in the purchase and development of the property are standing ready as soon as the Solvey Process people get around, and we do not anticipate any further delay in bringing the matter to an early conclusion"; and he states, on the same page, that these "other parties," thus referred to, were the "Pittsburg people, the Tri-State people."

At page 28, writing to Milliken, he says: "I have no doubt from what you say of your people that they are the kind of people we would be glad to have interested in the proposition." He nowhere claims in the testimony that the information received by him from Milliken in this respect, or in any other, had in any way proved other than authentic and satisfactory.

After the failure of Dotson to procure verification of his representations as to the railroad, Easter testifies, at page 16, "We therefore gave up the entire proposition, and *purchased coal lands elsewhere*"; and, on page 21, referring to Dotson's attempt to re-open the negotiation with the company, he testifies, "We refused to take the matter up on Dotson's letter in October, *for the reason that we had purchased and begun operations in another field.*" In his letter of January 13, 1903, produced and offered in evidence during his examination as a part of the negotiation between the parties, without effort by cross-examination or otherwise to question its statements, Easter wrote that, after obtaining the option and having the mining engineers examine the land, he had directed Milliken to notify Dotson of the decision to purchase 10,000 acres, that Dotson came to Pittsburg, that they met him at his room in the Hotel Henry and were ready to close

for the purchase; that they waited a reasonable time for him to get a letter from Spencer which he undertook to do; that they then dropped the entire matter, so informed Milliken, had made other arrangements for coal lands, were now developing them, and did not care to purchase more.

We submit that the objection is as unfounded in point of fact, in view of the evidence, as the authorities show it to be unfounded in point of law.

II.

The second and only remaining assignment of error is to the rejection of the fifth prayer offered on behalf of the plaintiff in error, at page 83 of the Record, which was as follows:

> "5. If the jury believe from the evidence that any *bona fide* purchaser was actually found by the plaintiff for 10,000 acres of said land as claimed in the declaration, upon the representations of said plaintiff to said purchaser as to the existence of a certain agreement between the defendant and the Southern Railway Company concerning the construction of a branch railroad into said lands, and the purchaser did not rely on the said statements and representations of said plaintiff, but with the knowledge or co-operation of said plaintiff and at his suggestion sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof, and that said purchaser had the opportunity of investigating, ascertaining and verifying the truthfulness of such statements and representations, and took advantage of that opportunity by interviews, conferences, or written communications, either personally or by attorney, or by others, with the president and first vice-president of the Southern Railway Company for the purpose of verifying the said statements and repre-

sentations so made by the plaintiff as to any agreement existing between the defendant and Southern Railway Company in regard to the construction of said branch railroad and ascertained from the said officers of the said railway company, from time to time during said negotiations and before September 15, 1902, the date upon which it is alleged in the declaration that said purchaser was found, that no agreement existed between the defendant and said Southern Railway Company to build said branch railroad, but that the subject of building said railroad had only been discussed, and that the building thereof depended on the development and improvements to be placed on said land prior to the construction of any railroad, in the way of opening coal mines, establishing coke ovens, or furnishing the railroad with a sufficient amount of tonnage, and that said plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which said branch railroad would be constructed and of the non-existence of any agreement between the defendant and Southern Railway as alleged, then the defendant is not responsible for the non-appearance of the alleged sale or purchase of the land between the plaintiff and the alleged purchaser, and you should find for the defendant."

This instruction was properly rejected, for a variety of reasons.

In the first place, there was no evidence whatever that the purchaser, "with the knowledge and co-operation of said plaintiff and at his suggestion, sought and undertook to verify the truth of such statements and representations during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof."

The first communication from the purchaser to the Railway Company was the letter of August 23, 1902 (Rec., p. 14), only two days before Milliken, by Easter's direction, notified Dotson of the acceptance of the ten thousand acres,

while the reply to that letter, which was the first information received by the purchasers from any source other than through Dotson himself, was not written until August 29th (Rec., p. 14), three days after the consummation of the contract by the notice of acceptance.

In the second place, there is not the slightest evidence that the purchaser's act in thus seeking information from the Railroad Company, was with the co-operation of the defendant in error, at his suggestion, or with his knowledge.

In the third place, the instruction fixes September 15th, the date alleged in the declaration under a *videlicet* as that upon which the purchaser was furnished, as the absolute date, and requires the jury to find that, if the unfounded character of Dotson's representation were known before that date, *i. e.*, within ten days after the Hotel Henry interview, defendant in error could not recover.

4. Its effect was to instruct the jury that, after the defendant in error had furnished the plaintiff in error with a purchaser ready, able and willing to comply with the stipulated terms, the former lost his compensation because the latter thereafter sought to verify the truth of the owner's representations, with the knowledge or co-operation of the defendant in error. In other words, if, after producing the purchaser, the broker either co-operated in or knew of the efforts of the purchaser to avoid being victimized by seeking to learn the truth as to the inducements held out to him by the owner for making the purchase, the commissions were forfeited.

5. It denies to the defendant in error the right to recover if the jury should find that the "plaintiff and alleged purchaser had full knowledge and information from the proper officers of the Southern Railway Company of all the facts relating to the conditions upon which the said branch railroad would be constructed, and of the non-existence of any agreement between the defendant and Southern Railway

as alleged," although there was no testimony whatever to show any such knowledge or information upon his part until after September 4th, on which date he had brought the plaintiff in error and the purchaser together at the Hotel Henry, and the latter was prepared to consummate the purchase.

In rejecting this instruction, the trial court called attention to the fact that it was not limited to knowledge or information possessed by the defendant in error prior to the time when the purchaser had been produced and was ready to consummate the sale, and that it could not be granted among other reasons, because it did not "undertake to refer to any time prior to the actual consummation of this sale;" notwithstanding which express notice of the infirmity, in this respect. counsel elected to stand upon it.

In the opposing brief, the defect last noted is sought to be overcome by reference to the occurrence of the phrase "during the pendency of the negotiations for the purchase of said land before any transaction was closed for the purchase thereof," in the early part of the lengthy prayer—ignoring the fact that, later in it, September 15th is fixed by the instruction, to be given as matter of law by the court, as the date when the purchaser was found; as, also, the fact that the full knowledge and information from the officers of the railway company, or any of them, referred to, was not conveyed to either the defendant in error or the purchaser prior to the latter's acceptance of the option.

At page 40 of the opposing brief, certain expressions in circulars sent to Milliken prior to April 30th, the date of the first meeting between Dotson and himself, are relied upon as giving him notice that the branch railway was to be built when the parties interested were ready to open up coal mines and put in coke plants. The dated circular, bearing date only six days before the interview, is not quoted—its statement being, without the suggestion of any conditions, "*We have arranged* with railroad companies to build a branch

into and develop the lands"—followed by the letter of May 8, 1902, stating, unequivocally, that, after full discussion of the subject, Mr. Spencer was willing to build the road into the property without any requirements of the property-holders to put in certain sized plants or any number of coke-ovens, and that he was ready to commence work on the road as soon as the parties werey ready for him to do so, leaving them to use their own judgment as to the extent of the development they would make.

The only evidence tending to show that Milliken made any inquiries is that discussed at p. 41 of the opposing brief. He had been satisfied with Dotson's oral assurances at the meeting of April 30th, but the Pittsburg parties were not (Rec., pp. 27-8, 29). He thereupon telegraphed and wrote Dotson, resulting in the latter's letter of May 8th, and he also wrote to the President of the Louisville & Nashville Railway Company. He wrote, also, to Spencer, but did not send the letter, because "he relied on Dotson" (p. 30), evidently referring to Dotson's letter of May 8th. His telegram of May 8th to Dotson, sent at the instance of the Pittsburg parties, who were not satisfied with Dotson's oral statements or former letter, although plaintiff was, scarcely justifies the statement, at page 41 of the brief, that, up to the time the telegram was sent, "Milliken understood that the railroad would not be built unconditionally."

The concluding argument of the brief for plaintiff in error that the evidence, taken together, shows that the defendant in error did not rely upon Dotson's representations, is answered by its own statement, "But this is not a bill in equity." In the instruction which the court granted, the trial court required the jury to find, as the condition of his recovery, that the plaintiff expended his time and effort in the attempt to find a purchaser, "relying upon the said representations of the defendant"; and in the charge, at page

93, the court added: "You must find, of course, that the plaintiff in this case relied upon these representations made by the defendant—if you find he made them, and that the plaintiff, relying upon the said representations, expended time and effort in the attempt to find a purchaser, and did find a purchaser," ready and willing to purchase the land at the price fixed, etc.

It is respectfully submitted that there was no error in the granting of the prayer offered on behalf of the defendant in error, nor in the rejection of the instruction offered on behalf of the defendant below, covered by the assignment of error, and that the judgment should be affirmed.

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